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A late legislature of Kansas passed an act in relation to the redemption of property after sale under foreclosure. (Chap. 109 Sess. Laws, 1893.) In substance, it provides that a mortgagor shall have eighteen months after sale under foreclosure to redeem; "that a receiver can only be appointed in case of waste; that the income during the period for redemption, except what is necessary to keep up repairs and prevent waste, shall go to the owner or defendant in execution, or the owner of the legal title." The Supreme Court of Kansas, in Watkins v. Glenn, 41 Cent. L. J. 68, held that the act, in so far as it assumed to operate retroactively, and apply to mortgage contracts existing at and before its passage, was repugnant to section 10, of article 1 of the federal constitution, providing that no State shall pass any law impairing the obligation of contracts. This decision was rendered in April, 1895, the opinion written by Chief Justice Horton being clear and convincing. The court has lately been called upon to consider the same question, and in the recent case of Beverly v. Barnitz, 42 Pac. Rep. 725, the court reverses its former decision and holds the statute both retroactive and constitutional. This is said to be due to a change in the *personnel* of the court, though as to that we know nothing. We do not think, however, that the court has done itself any credit by its change of view on the subject. The opinions of the court are quite lengthy; the argument in favor of the constitutionality of the statute being that a redemption law passed after a mortgage has been made affects the remedy only and does not touch the substantial rights of the parties. On the other hand, Chief Justice Horton, in his opinion in the Watkins case, cites a long list of decisions of the United States Supreme Court, the substance of which is expressed by Mr. Justice Field in Louisiana v. New Orleans, 102 U. S. 203, as follows: "The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened. The Latin proverb, *qui cito dat bis dat*—he who gives quickly gives twice—has its counterpart in a maxim equally sound, *qui serius solvit minus solvit* he who pays too late pays less. An authorization of the postponement of payment, or of means by which such postponement may be effected, is in conflict with the constitutional inhibition." To the same effect is Siebert v. Lewis, 122 U. S. 284, and many other cases which are cited approvingly in the Watkins case. In view of these decisions, the conclusion is almost irresistible that the Supreme Court of Kansas in its latest announcement on this subject has been controlled more by considerations of expediency than law.

It would not occur to the student of law that a decision of court is needed to uphold the proposition that one who seduces an unmarried woman is not liable in damages to her affianced husband. But the unfortunate plaintiff in Case v. Smith, 65 N. W. Rep. 278, recently decided by the Supreme Court of Michigan, who brought a suit of that description, evidently felt that there was some doubt of the question. The court, affirming the decision of the trial court, very properly held that a civil action for the alleged seduction of the woman could only be brought by the woman herself, or by her father, guardian, or some relative. A betrothed person has no right of action for the seduction or the alienation of the affections of his affianced. Cooley, Torts, p. 236. In Swanson v. Griffin, 8 South. Rep. (Miss.) 511, cited by appellant, defendant had seduced plaintiff's unmarried daughter, and she had given birth to a child. In Brannum v. O'Connor, 77 Iowa, 632, 42 N. W. Rep. 504, also cited by appellant, plaintiff had married defendant's foster daughter, and afterwards learned that she was pregnant, at the time of the marriage, by her foster father. Defendant agreed to continue to live with the woman and maintain the child. The court held that under the code the pregnancy of the woman at the time of her marriage was a cause for divorce, and that plaintiff was under no obligation to live

with the woman or maintain the child. In Loomis v. Cline, 4 Barb. 453, the maker of the note had assaulted plaintiff's daughter with attempt to commit a rape. The court held that, from his paternal relation alone, plaintiff had no authority to commence an action for his daughter; that he could not release or compromise such claim, and so, if she had a right of action, it remained unaffected by that agreement, and that the note was without consideration, citing Fonda v. Van Horne, 15 Wend. 631; Hunter v. Westbrook, 2 Carr. & P. 576; Macph. Inf. 228, 352.

NOTES OF RECENT DECISIONS.

GIFT CAUSA MORTIS—SUFFICIENCY OF EVIDENCE.—In Leyson v. Davis, 42 Pac. Rep. 775, decided by the Supreme Court of Montana, it appeared that the owner of a majority of the stock of a national bank, 70 years old and in feeble health, on the eve of departure on a journey for his health, handed the certificates of stock to his nephew, saying: "I always intended that for you. Now take it. * * * I don't know whether I will ever come back or not. There may be an accident on the railroad. If I don't come back, or anything happens, I want you to have it. I am an old man, and there is no telling. * * * I don't think I can get over this disease. * * * I am too old. I can't expect it."—and the nephew took the certificates, and kept them till after the donor's death. It was held that there was a valid gift *causa mortis*, though the by-laws of the bank and the United States statutes provide that stock shall be transferable only on the books of the bank, and the donor did not die till after his return from the journey, where his death was due to the illness of which he complained, and he had often expressed his intention of giving "the bank" to the donee, and stated that he did not intend that "the bank" should go into his estate, and the certificates had no form of assignment indorsed on them.

NUISANCE—POLLUTION OF STREAM.—Injunction to a bill by a riparian proprietor to restrain defendant from polluting, by discoloration, the stream, it is no defense or equitable excuse that the discoloration is the natural and necessary result of mining operations prosecuted in the ordinary way, says the New Jersey Court of Chancery in Beach v. Sterling Iron and Zinc Co., 33 Atl. Rep. 286, repudiating the doctrine finally adopted in Pennsylvania in the case of Coal Co. v. Sanderson, 113 Pa. St. 126. Nor can the defendant set up that other independent causes are already operating to pollute. The maintenance of a nuisance to real estate, they contend, amounts to a taking of property, and cannot be legalized by the legislature for private purposes, even upon terms of making compensation. Hence, where the right of the complainant is clear and the facts undisputed, a court of equity is bound to give preventive relief. To refuse it is to allow the defendant to take complainant's property upon terms of paying such compensation, from time to time, as a jury may assess.

NEGOTIABLE INSTRUMENT—BANKS—KNOWLEDGE OF CASHIER—WHEN IMPUTED TO BANK.—One of the points decided by the Supreme Court of Utah in First Nat. Bank v. Foote, 42 Pac. Rep. 205, is that a bank that takes for value a note signed by its cashier and others is not chargeable with knowledge of an agreement between the cashier and his comakers that the note was not to be delivered until it was signed by the president of the bank. The general rule is well established that a principal is bound by the representations of his agent, made in the transaction of the principal's business, within the real or apparent scope of his authority, and that the knowledge of the agent concerning the business which he is transacting for his principal is to be imputed to his principal. There are, however, exceptions to the general rule no less well established. No person can act as an agent in regard to a contract in which he has any interest, or in which he is a party on the opposite side to his principal. 2 Daniel, Neg. Inst. § 1611; Story, Ag. § 210; Claflin v. Bank, 25 N. Y. 293; Voltz v. Blackmar, 64 N. Y. 440; West St. Louis Sav. Bank v. Shawnee Co. Bank, 95 U. S. 557. The court distinguished the case of Atlantic Cotton Mills v. Indian Orchard Mills, 147 Mass. 268, which announces the doctrine that an agent's knowledge of his own fraud is to be imputed to the principal in a transaction

where the agent alone represents the principal. "This is a distinction" says the Utah court, "which seems to us less substantial than technical, and we cannot give it our assent. The rule of law which imputes the knowledge of an agent to his principal, according to most of the authorities, is based upon the presumption that the agent will communicate to his principal whatever he knows concerning the business he is transacting, and the exceptions to the rule upon the contrary presumption, that the agent will not communicate to his principal his knowledge of his own independent frauds, committed in the course of transacting the principal's business, and that he will not communicate to his principal his knowledge in a transaction where he is interested upon the opposite side. In a case where the presumption arises that an agent will not communicate his knowledge to his principal, or to another acting for the principal, it would seem to be unreasonable to hold the principal responsible for the knowledge of the agent solely because the agent in the particular transaction appeared himself for the principal. The presumption would naturally be, in such a case, that he would fail to act upon such knowledge as the principal would act, just as he would fail to impart his knowledge in a case where another appeared for the principal."

CONTRACT—SALE—DAMAGES—FAILURE OF PRINCIPAL TO PERFORM CONTRACT BY BROKER.—In Haas v. Ruston, 42 N. E. Rep. 298, the Supreme Court of Indiana holds that a broker employed to negotiate the sale of flour at a certain price, who, without express authority, makes a contract for the sale thereof at such price in his own name, cannot, on his principal's refusal to deliver at the price named, recover from the principal damages paid by him to the purchaser for his failure to perform the contract of sale, nor is he entitled to commissions on the price of the flour contracted for. The court said in part:

The main and controlling question in this controversy is: Can a broker make a contract in his own name, without the knowledge and consent of his principal, that will bind both his principal and the other contracting party? A broker is a peculiar kind of an agent, and brokerage is a peculiar kind of agency. It is the business of a broker to negotiate contracts between others in matters of trade and commerce. He usually deals with the contracting parties, and not with the things which may be the subject of the contract. He has neither interest in nor possession of the property which it is his business to buy or sell for others, and ordinarily he has no implied power to buy or sell in his own name. It is in these respects that a broker differs from a factor and from an ordinary agent. The office and duty of a broker is stated in Domat's Civil Law (part 1, bk. 1, tit. 17, art. 1), as follows: "1204. The Office of a Broker. The engagement of a broker is like to that of a proxy, a factor, or other agent; but with this difference: that the broker being employed by persons who have opposite interests to manage, he is, as it were, agent both for the one and the other, to negotiate the commerce and affair in which he concerns himself. Thus his engagement is two-fold, and consists in being faithful to all the parties in the execution of what every one of them entrusts him with. And his power is not to treat, but to explain the intentions of both parties, and to negotiate in such a manner as to put those who employ him in a condition to treat together personally." In Story on Agency, the office of broker is thus defined: "Sec. 28. Secondly, Brokers. The true definition of a broker seems to be that he is an agent, employed to make bargains and contracts between other persons in matters of trade, commerce, or navigation, for a compensation, commonly called 'brokerage.' Or, to use the brief but expressive language of an eminent judge, 'A broker is one who makes a bargain for another and receives a commission for so doing.' Properly speaking, a broker is a mere negotiator between the other parties, and he never acts in his own name, but in the names of those who employ him. Where he is employed to buy or sell goods, he is not intrusted with the custody or possession of them, and is not authorized to buy or sell them in his own name. He is strictly, therefore, a middle man, or intermediate negotiator between the parties." Again, in section 34 of the same authority, the difference between factor and broker is thus stated: "Section 34. A factor differs from a broker in some important particulars. A factor may buy and sell in his own name as well as in the name of his principal. A broker (as we have seen) is always bound to buy and sell in the name of his principal. A factor is intrusted with the possession, management, control, and disposal of the goods to be bought or sold, and has a special property in them, and a lien on them. A broker, on the contrary, usually has no such possession, management, control, or disposal of the goods, and consequently has no such special property or lien." 1 Bell, Comm. (4th Ed.) p. 386, § 409, in comparing the duties of factor and broker, says: "The character of factor and broker is frequently combined; the broker having possession of what he is employed to sell, or being empowered to obtain possession of what he is employed to purchase. Properly speaking, in these cases he is factor." Again, the relation of broker and factor is clearly stated by Story: "Sec. 109. Secondly, as to brokers. These, as we have seen, have an incidental authority to sign the contract for, and as the agent of both parties. A broker employed to effect a policy has an incidental authority to adjust losses upon it; and, if employed to settle losses, he has authority to refer a disputed loss to arbitration. A broker employed to buy or sell without limitation of price has the incidental authority to bind his principal by any price, at which he honestly buys or sells. So, a broker authorized to sell goods without any express restriction as to the mode may sell the same by sample or with warranty. Ordinarily, he cannot make the contract in his own name, but ought to do it in the name of the principal. There are exceptions, however, by the usages of trade, as in cases of policies of insurance, which are usually made

in the name of the policy broker, and he may then sue thereon. So he cannot buy or sell on credit, except in cases justified by the usages of trade. So a broker has ordinarily no authority *virtute officii* to receive payment for property sold by him; and, if payment is made to him by the purchaser, it is at his own risk, unless from other circumstances the authority can be inferred."

The leading case in which the distinction between a broker and that of a factor, and other agents, is carefully pointed out is that of Baring v. Corrie, 2 Barn. & Ald. 143. The court, by Abbott, C. J., said: "The distinction between a broker and a factor is not merely nominal, for they differ in many important particulars. A factor is a person to whom goods are consigned for sale by a merchant residing abroad, or at a distance from the place of sale; and he usually sells in his own name, without disclosing that of his principal. The latter, therefore, with full knowledge of these circumstances, trusts him with the actual possession of his goods, and gives him authority to sell in his own name. But the broker is in a different situation. He is not trusted with the possession of the goods, and he ought not to sell in his own name. To the same effect Mr. Justice Holroyd observed, in the same case, that a factor 'is a person to whom goods are sent or consigned, and he has not only the possession, but, in consequence of its being usual to advance money upon them, he has also a special property in them, and a general lien upon them. When, therefore, he sells in his own name, it is within the scope of his authority, and it may be right, therefore, that the principal should be bound by the consequences of such sale, amongst which the right of setting off a debt due from the factor is one. But the case of a broker is different. He has not the possession of the goods, and so the vendee cannot be deceived by that circumstance; and, besides, the employing of a person to sell goods as a broker does not authorize him to sell in his own name. If, therefore, he sells in his own name, he acts beyond the scope of his authority, and his principal is not bound.'" Ewell's Evans, Ag. p. 4. Again, in Ewell's Evans, Ag. side page 122, the authority of a broker is most clearly stated, both as to acts authorized and prohibited. After giving fully what is the implied authority of broker, it is stated: "A broker has no implied authority—(a) To buy or sell in his own name. The case of an insurance broker is an exception to this rule. He need not even state that he contracts as a broker. (b) To receive payment for goods sold for his principal. But an insurance broker has authority to receive payment of any loss that may occur on a policy effected by him, if the instrument remains in his hands." See, also, Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. Rep. 160; White v. Chouteau, 10 Barb. 202; Buckbee v. Brown, 21 Wend. 110; Dugan v. U. S., 3 Wheat. 172; Pott v. Turner, 6 Bing. 702; State v. Duncan, 10 Lea, 75. It would seem from the authorities that the only exception to the rule that a broker cannot contract in his own name is in the matter of insurance policies. The appellant cites and relies upon as holding a contrary doctrine, the cases of Knapp v. Simon, 96 N. Y. 284; Saveland v. Green, 36 Wis. 612. In these cases, however, it appears that the broker made the contract in his own name at the request or with the knowledge of the principal.

The distinction between the powers of a broker and that of a factor is supported by reason as well as by authority. A factor has the possession of the goods; frequently has a lien upon them for moneys advanced. He has one of the indices of title. The contract is made upon his credit, and, although in his name, it may be enforced both as against himself and against his principal, and be enforced both by him and his principal against the other contracting parties. An ordinary agent, acting in the scope of his authority, may bind his principal when the contract is made for principal's benefit, although made in the name of the agent, and the principal may enforce the contract, or it may be enforced against him. Although the contract may have been made upon the credit of the agent, the other contracting party may, when he discovers the principal, elect to pursue the principal instead of the agent, and in some instances he may pursue both. Mechem, Ag. §§ 558, 977; Lawson, Cont. § 197. It is true that the principal is bound to indemnify his agent for all acts lawfully done in the execution of his authority. This includes all expenses properly incurred, and extends to all acts done by the agent in the course of his agency in which he has incurred or undertaken a liability or sustained damages. Lawson, Cont. § 179. But the principal is not liable to the agent for acts *ultra vires*, or in excess of his authority, unless the acts have been ratified. A broker occupies a peculiar relation to the contracting parties. He frequently represents both, and is often entitled to a commission for buying and a commission for selling in the same transaction. He has no possession that can mislead one of the contracting parties. If he were permitted to make contracts in his own name for his principal, and without the principal's knowledge, he would be in a position to take advantage of a rise or fall in prices. The contract being in his own name, he might claim the profits, and, in the event of loss, cast it upon his principal. His powers might be much abused, and the interests of the principal sacrificed. It is for these reasons that the policy of the law forbids a broker from contracting in his own name without the knowledge or consent of the principal.

LIABILITY OF EMPLOYERS FOR THE NEGLIGENCE OF CONTRACTORS.

As this is essentially a building age, the liability of employers for the negligence of contractors is a question of every-day application, and therefore of the highest importance. It is a question, too, involving many niceties of distinction which are well worth the care and consideration of the student of the law. It is my purpose to present in this essay a brief exposition of the principles and rules which govern the subject; and while I shall, when necessary, quote authority to support them, I have deemed it more fitting to the task in hand to devote greater attention to discussion than to the enumeration of cases to sustain any particular view. Although the law upon the subject is pretty well settled, there are one or two rules which have been rejected by some of the courts, and only accepted by others after they had expressed a doubt as to their wisdom and expediency,

because the judges felt themselves bound by precedent and authority.

The general doctrine may be stated as follows:

An employer is not responsible for the negligence of a contractor or his servants.[1] A contractor, within the meaning of the rule, is a person who, in the pursuit of an independent business, undertakes to do specific jobs of work for others without being subject to their control in respect to the details of the work.[2] He furnishes his own assistants, and it is immaterial whether he executes the work according to his own ideas, or in accordance with a plan previously furnished him by the person for whom the work is done.[3]

Qui facit per alium facit per se is one of the fundamental maxims of the law. At first presentation it would seem to apply in the case of contractors, but not so when the reason of the rule is thoroughly understood. The master's liability for the acts of his servant is based on the fact that the servant performs the will of the master, not merely as to the general result to be accomplished, but also in the specific details of the work. The servant is subject to his orders and directions at all times. These directions may be altered or entirely changed, but the servant must obey them. He must obey them both as to the final purpose in view, and as to the manner in which every portion of the work is to be done. The master acts through the servant, and the result is just the same, in contemplation of law, as if the master himself were performing the service; hence his liability for the acts of his servant. With this explanation we can readily see why this rule should not apply in the case of contractors. The contractor is engaged in an independent business. He is not subject to the control of his employer. He does not receive directions as to the manner of performing the details of the work. He has bargained to bring about a certain result. In doing this he either exercises his own discretion, or proceeds in accordance with certain plans. In either case he can do each portion of the work just as he pleases. All that is required of him is that the whole shall correspond with the designs furnished him. Besides, the contractor employs his own assistants. The employer has no voice in this whatever. It will be seen, therefore, that the distinction between the two cases is very plain and pronounced. However, it may sometimes happen that the employer retains control over the contractor or his servants, and this gives rise to the first exception to the general rule.

Exception 1. The employer will be liable if he reserve control over the contractor or his servants, or over the manner of doing the work.[4] Such a reservation makes the contractor and his assistants the servants of his employer, and the maxim, *Qui facit per alium facit per se*, applies with full force and reason. However, a mere superintendence of the progress of the work, to see that it is done according to contract, is not such control as will make the contractor the servant of his employer.[5] It is only when the control is so absolute as to make the discretion of the contractor subordinate to that of the principal, or to that of his architect, engineer or other superintendent.[6]

It was sought at one time to distinguish between real and personal property as to the liability of the owner for the negligence of contractors, some of the courts holding that no liability attached to the owner of personal property, but that the owner of real property should be liable on the ground that he should so use his property as not to injure others. I must confess that I cannot see the reason for such a distinction. I cannot understand why I should be responsible for the negligence of a house builder, and be exempt from liability for the negligence of a carriage manufacturer. That would only be carrying the doctrine to its logical conclusion, and there would be no such thing as independence of business. Every business man, while executing my orders for goods, would be my servant, and such a rule would involve us in inextricable confusion. No man would be exempt from suit. But the advocates of this theory say that it is intended to apply only to real estate. Even in that case, it seems to me that they misapprehend the true meaning of the rule that a person should so use his real estate as

[1] Reedie & Hobbitt v. London & N. W. Ry., 4 Exch. 244; Linton v. Smith, 8 Gray (Mass.), 147.

[2] Harrison v. Collins, 86 Pa. St. 153.

[3] Robinson v. Webb, 11 Bush (Ky.), 467; Hale v. Johnson, 80 Ill. 185.

[4] Linnehan v. Collins, 137 Mass. 123; Cincinnati v. Stone, 5 Ohio St. 38; New Orleans, etc. R. R. Co. v. Hanning, 15 Wall. 649.

[5] Clark v. Hannibal, etc. R. R. Co., 36 Mo. 202.

[6] Slater v. Mersereau, 64 N. Y. 138.

not to injure others, and that he cannot free himself of such responsibility by employing others to do the work. This rule, I take it, applies with good reason in three cases only, and they furnish the second, third and fourth exceptions to the general rule.

Exception 2. The employer will be liable if he contract to have a thing done which obviously exposes others to peril.[7]

Exception 3. The employer will be liable where the work results in a nuisance which flows directly from the work itself.[8]

In these cases the injury is not the result of the carelessness of the contractor or his servants. It is not caused by the improper manner in which the work is done. It is the obvious consequence of the nature of the work itself. And the liability of the employer does not rest upon the doctrine of *respondeat superior*. It rests upon entirely different grounds. He himself is guilty of negligence. He is making an improper or unlawful use of his property. And this, as I understand it, is what is meant by so using your real estate as not to injure others; simply that you should not make an unlawful or improper use of it. This is based upon the sound and equitable principle that every man should be responsible for his own negligence.

The fourth exception proceeds upon still another principle.

Exception 4. The employer will be liable if he is under a legal duty to see that the work is properly performed.[9] This rule applies principally to work done under public authority, such as the construction of canals, the improvement of streets, etc. Public policy demands that such work should be properly executed, and will not permit the corporation to escape responsibility by delegating its powers to others.

These three exceptions, it seems to me, are the only instances where the employer should be held liable. The first two are based on the negligence of the employer; the last upon public policy. But we are told that the rule should be extended so as to make the employer pay damages for the negligence of a contractor in the performance of a lawful and proper piece of work. Aside from the hardship of making a man responsible for the acts of those who are not subject to his control, a doctrine that outrages every principle of justice, I am of the opinion that such a rule would fail to accomplish the purpose of the law. The object and purpose of all law, with respect to torts, is prevention and not the payment of damages. Equity may prevent the commission or continuance of certain classes of torts by means of the injunction. It acts directly upon a person and compels him to do his duty. The object of the common law is just the same, but its method is different. It cannot anticipate an injury. It simply exacts damages from the party committing the injury. The fundamental purpose, however, is to prevent the injury, and damages are given as a sort of penalty, the theory being that the knowledge that a man will have to pay for his negligence will operate as a stimulus to the performance of duty. In every case prevention of the wrong is the end in view, and the payment of damages the means whereby that end is sought to be accomplished. This being the case, these means should be used where they will be most efficacious. Now we have every incentive for the employer to do his duty.

In addition to the exceptions to the general rule to which I have already adverted, there is still another of equal importance.

Exception 5. The employer will be liable if he knowingly employ an incompetent or untrustworthy contractor.[10] This proposition is not supported by any well-adjudged case, but it seems to have met the approval of the text-writers, and it is certainly founded on good reason. It is another instance of negligence on the part of the employer. The employer having to respond in damages where the case comes under one of these exceptions, he will be prompted to secure a skillful and reliable contractor, and to use every means to prevent the work being of such a character as will result in a nuisance or obviously expose others to peril. Now, suppose he has taken all these precautions, will his liability for the negligence of the contractor tend to prevent the injury? Certainly not. He may live in one city and the work be performed in another. At any rate he can have no voice in employing or directing the contractor's

[7] Cooley on Torts, p. 646; Garman v. Steubenville, 4 Ohio St. 399.

[8] Robbins v. Chicago, 4 Wall. 657.

[9] Water Co. v. Ware, 16 Wall. 566; Bailey v. Mayor, etc. of New York, 2 Denio, 433; Logansport v. Dick, 70 Ind. 65.

[10] Lawrence v. Shipman, 39 Conn. 586.

servants. The matter has gone beyond his control. How, then, will the purpose of the law be best accomplished? Manifestly by placing the liability entirely upon him who has it in his power to prevent the injury; that is upon the contractor. He employs his servants; he directs and controls them; he superintends the work. Therefore, if we make him liable, he will be prompted to hire skillful and reliable assistants, and to give the work personal care and supervision. But if we adhere to the doctrine of *respondeat superior*, we make him responsible who has no power to prevent the injury, and let him escape who alone could bring about the result desired; in other words, we have utterly failed of our purpose.

Bush v. Steinman[11] is the case most frequently quoted in support of the real estate theory, but a thorough examination of the authorities upon which the court relied will show that they do not justify such a rule. That case, briefly stated, was as follows: The defendant contracted with a surveyor to repair his house for a stipulated sum; a carpenter having contracted under the surveyor to do the whole business, employed a bricklayer, and he again contracted with a lime-burner, by whose servant a quantity of lime was laid in the road. While the plaintiff and his wife were out riding their carriage struck the lime and was overturned and considerably damaged. The defendant was held liable, citing a number of English cases.[12] The first three of these are cases where the employer had control and supervision of the work, thus creating the relation of master and servant. There was no independent contract. The last is a case where the work necessarily injured the rights of others. Now, the case of Bush v. Steinman could not rest on the relation of master and servant; it was an independent contract. Nor could it rest upon the ground of work that necessarily injured others. Our conclusion must, therefore, be that it is not sustained by the cases cited. However, its discussion now is of very little moment, except to understand that the real estate theory was erroneous in its origin, for it is no longer the law, as will be seen by reference to the following cases, and many others which could be quoted:

In Hobbitt v. London, etc. R. R. Co.,[13] the court say: "The case of Bush v. Steinman, where the owner of the house was held liable for the act of the servant of a subcontractor acting under the builder employed by the owner, was a case of fixed real property. That case was strongly pressed in argument in support of the liability of the defendants both in Laughler v. Pointer and in Quarman v. Burnett, but the circumstances of those two cases were not such as to make it necessary to overrule Bush v. Steinman. If any distinction in point of law did exist in cases like the present between fixed property and ordinary movable chattels, it was right to notice the point; but on full consideration we have come to the conclusion that there is no such distinction unless, perhaps, in cases where the act complained of is such as to amount to a nuisance, and, in fact, that according to the modern decisions Bush v. Steinman must be taken not to be the law, or, at all events, that it cannot be supported on the ground on which the judgment of the court proceeded."

In Robinson v. Webb[14] it was held that a contractor to build a house is not the servant of the lot owner, and that he alone is liable for his own negligence or the negligence of his servants. In this case the whole ground of distinction was gone over, and the authorities pro and con ably discussed. In speaking of the case of Bush v. Steinman, the court said: "This case has long since been overruled in England, but not until it had been recognized and followed by some of the courts of this conntry as well as in England."

In Blake v. Ferris[15] we have the following language: "Upon examination of the whole case of Bush v. Steinman it would appear that the main proposition asserted by it is not the law in England nor in this State."

In Cuff v. Newark, etc. R. R. Co.,[16] we find this remark: "After recognition as authority for a time Bush v. Steinman was overruled. At first its authority was restricted to liability for negligence in relation to real estate, making a distinction in this re-

[11] 1 B. & P. 403.

[12] Stone v. Cartwright, 6 Tr. 411; Littleton v. Lonsdale, 2 H. Bl. 267; Michael v. Alestree, 2 Lev. 172; Rosewell v. Prior, 2 Salk. 460.

[13] 4 Exch. 254.

[14] 11 Bush (Ky.), 467.

[15] 5 N. Y. 48.

[16] 35 N. J. L. Rep. 17.

spect between the owners of real and personal property; finally this distinction was abandoned, and the authority of Bush v. Steinman was completely denied, and no case which was once authority has been more completely overthrown."

It will be seen, therefore, that there is no good authority, and certainly no good reason, for the distinction between real and personal property as to the liability of their owners for the negligence of contractors, and this is as it should be. The policy of our system of jurisprudence should be to make every man responsible for his own negligence, unless his conduct is controlled by others. This would promote independence of business and insure individual responsibility, a condition of affairs which would certainly result in fewer accidents and less suits.

The whole doctrine upon this question, as supported by authority and dictated by reason and justice, may be summed up in the following proposition:

An employer who has bargained with a reliable and skillful contractor, over whom he has no control, to do a piece of work which is neither unlawful nor necessarily dangerous in its character, nor such as he is under a legal duty to have properly performed, will not be responsible for the negligence of such contractor, his subcontractors or his servants, in the prosecution of such work.

WM. ROGERS CLAY.

Lexington, Ky.

CRIMINAL EVIDENCE—MURDER—BOY AS WITNESS—COMPETENCY—FEDERAL OFFENSE.

WHEELER V. UNITED STATES.

Supreme Court of the United States, November 11, 1895.

The decision of the question whether a very young boy has sufficient intelligence to be competent as a witness must rest primarily with the trial judge, and his determination will not be disturbed on review, unless it was clearly erroneous.

On a trial for murder, a boy nearly five and a half years old, being offered as a witness, stated on his *voir dire* that he knew the difference between the truth and a lie; that if he told a lie, the bad man would get him; that he was going to tell the truth; that his mother had told him that morning to "tell no lie." To the question what would be done with him n court if he told a lie, he replied that they would put him in jail, and to a question as to what the clerk said to him when he held up his hand, he answered: "Don't you tell no story." Held, that there was no error in admitting his testimony.

An indictment in the Circuit Court for the Eastern District of Texas for a murder committed in the Indian Territory sufficiently negatives the exception to the jurisdiction of the court contained in Rev. St. § 2146, when it charges that defendants were not Indians, nor citizens of the Indian Territory.

Mr. Justice BREWER delivered the opinion of the court:

On January 2, 1895, George L. Wheeler was by the Circuit Court of the United States for the Eastern District of Texas adjudged guilty of the crime of murder, and sentenced to be hanged; whereupon he sued out this writ of error. Three errors are alleged: First, that the indictment is fatally defective in failing to allege that the defendant and the deceased were not citizens of any Indian tribe or nation. It charges that they were not Indians, nor citizens of the Indian Territory. The precise question was presented in Westmoreland v. U. S., 155 U. S. 545, 15 Sup. Ct. Rep. 243, and under the authority of that case this indictment must be held sufficient.

Another contention is that the court erred in overruling the motion for a new trial, but such action, as has been repeatedly held, is not assignable as error. Moore v. U. S., 150 U. S. 57, 14 Sup. Ct. Rep. 26; Holder v. U. S., 150 U. S. 91, 14 Sup. Ct. Rep. 10; Blitz v. U. S., 153 U. S. 308, 14 Sup. Ct. Rep. 924.

The remaining objection is to the action of the court in permitting the son of the deceased to testify. The homicide took place on June 12, 1894, and this boy was five years old on the 5th of July following. The case was tried on December 21, at which time he was nearly five and a half years of age. The boy, in reply to questions put to him on his *voir dire*, said, among other things, that he knew the difference between the truth and a lie; that if he told a lie, the bad man would get him, and that he was going to tell the truth. When further asked what they would do with him in court if he told a lie, he replied that they would put him in jail. He also said that his mother had told him that morning to "tell no lie," and, in response to a question as to what the clerk said to him when he held up his hand, he answered, "Don't you tell no story." Other questions were asked as to his residence, his relationship to the deceased, and as to whether he had ever been to school, to which latter inquiry he responded in the negative. As the testimony is not all preserved in the record, we have before us no inquiry as to the sufficiency of the testimony to uphold the verdict, and are limited to the question of the competency of this witness.

That the boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness is clear. While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former.

The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence, as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review, unless from that which is preserved it is clear that it was erroneous. These rules have been settled by many decisions, and there seems to be no dissent among the recent authorities. In Brasier's Case, 1 Leach, Crown Cas. 199, it is stated that the question was submitted to the 12 judges, and that they were unanimously of the opinion "that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath; for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence, but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the court." See also 1 Greenl. Ev. § 367; 1 Whart. Ev. §§ 398-400; 1 Best, Ev. §§ 155, 156; State v. Juneau, 88 Wis. 180, 59 N. W. Rep. 580; Ridenhour v. Railway Co., 102 Mo. 270, 13 S. W. Rep. 889, and 14 S. W. Rep. 760; McGuff v. State, 88 Ala. 147, 7 South. Rep. 35; State v. Levy, 23 Minn. 104; Davidson v. State, 39 Tex. 129; Com. v. Mullins, 2 Allen, 295; Peterson v. State, 47 Ga. 524; State v. Edwards, 79 N. C. 648; State v. Jackson, 9 Or. 457; Blackwell v. State, 11 Ind. 196.

These principles and authorities are decisive in this case. So far as can be judged from the not very extended examination which is found in the record, the boy was intelligent, understood the difference between truth and falsehood, and the consequences of telling the latter, and also what was required by the oath which he had taken. At any rate, the contrary does not appear. Of course, care must be taken by the trial judge, especially where, as in this case, the question is one of life or death. On the other hand, to exclude from the witness stand one who shows himself capable of understanding the difference between truth and falsehood, and who does not appear to have been simply taught to tell a story, would sometimes result in staying the hand of justice.

We think that, under the circumstances of this case, the disclosures on the *voir dire* were sufficient to authorize the decision that the witness was competent, and therefore there was no error in admitting his testimony. These being the only questions in the record, the judgment must be affirmed.

NOTE. — *Testimony of Children.* — Owing to the grave consequences attending testimony in any case to the one party or the other, and to the fact that the evidence may deprive one of life, liberty or property, the courts are accustomed to proceed with the greatest caution when it is proposed to put a child of tender years on the witness-stand to give testimony in any given cause. One very wholesome reason of the reluctance in courts to permit such testimony to be introduced is that the very young mind, as a rule, is not sufficiently developed to comprehend the gravity and solemnity of an obligation under oath, not only as to the moral turpitude attending all false swearing, but the consequences, grave and serious as they may often be, to parties litigant, of such testimony. They are not well up in the ways of the world or cognizant of the pivotal qualities their evidence might have in a case of the most gigantic importance. Nor can the importance or insignificance of the case have any bearing in determining whether the child possesses that necessary degree of intelligence or that sense of fear that would be engendered in a mature person of the future consequences in after life of "swearing falsely against his neighbor." Under most or perhaps all the constitutions a witness must believe in a Supreme Being before he is competent to testify. It is clear that the very young, as a rule, can have little or no accurate conception of such a Being though the cases reveal some astonishing instances of understanding in children in this respect. Very few, if any, cases are to be found where a witness not over four years old has been permitted to testify. But the principal case announces the correct rule when it is held that no abuse of discretion in the trial court being shown the appellate court will indulge the presumption that the *nisi prius* judge resorted to proper measures to ascertain the child's intelligence and competency generally before permitting it to testify. So it has been held that a child twelve years old may testify. People v. Smith, 86 Hun, 485. And where a boy thirteen years old upon examination was found to possess fair intelligence and understood the difference between truth and falsehood and comprehended the orthodox idea of future rewards and punishments, it was held that he was a competent witness though he further stated that he did not know what would be done with him here for swearing falsely: "Who knew he was sworn to tell the truth and that it was wrong to tell or swear a lie and that if he told or swore a lie he would go to the bad place." It was very properly held that the trial court had not abused its discretion in permitting the witness to testify. Partin v. State (Tex. Civ. App.), 30 S. W. Rep. 1067. And in a recent case in Kentucky it was held that "The intelligence of the witness is the true test of competency and that must be determined by the court, while the weight to be given to the evidence is for the jury. A child may be ignorant of God and of the evil of lying, and of the punishment prescribed therefor, both here and hereafter, and yet have sufficient intelligence to truthfully narrate facts to which its attention is directed.' White v. Commonwealth, 28 S. W. Rep. 340. It would certainly seem that the court goes far enough in admitting the testimony of the child in this case if we accept the usual requirement of a belief in a Supreme Being as a requisite to competency of any witness, but it seems that in this State under express constitutional enactment "all persons are competent as witnesses, so far as any religious test is concerned." Bush v. Commonwealth, 80 Ky. 244. The common law rule is that an infant at the age of fourteen years is presumed to have sufficient understanding until the contrary appears, but under that age no such presumption exists, "and therefore inquiry is to be made

as to the degree of understanding which the child offered as a witness may possess, and if he appears to have sufficient natural intelligence and to have been so instructed as to comprehend the nature and effect of an oath he is admitted to testify, no matter what his age may be. Greenleaf on Ev., Sec. 367. And this language is quoted with approval in Flannagan v. State, 25 Ark. 92. In the case of Warner v. State, 25 Ark. 447, a sentence of death brought about by the testimony of a girl under nine years old was sustained. So in a bill for a divorce where the evidence of children of the parties from seven or twelve years old was relied on to sustain the allegations and decree, it was held that the children having been carefully examined in the court below in regard to their capacity to testify as witnesses and having been found fully capable they were competent, and that they were properly permitted to testify (Freeny v. Freeny (Md.), 31 Atl. Rep. 304), the court also citing the above section of Greenleaf on Evidence. In the case of State v. Juneau, 88 Wis. 189, the Supreme Court of this State thus lays down the rule in harmony with the principal case: "It seems to be the settled law that after four years of age a child is not incompetent to testify as a witness by reason of any rule of law which excludes him. Whether a child above that age is competent to testify depends upon his intelligence which is to be determined by the trial court by examination of the child in court. The question is addressed to the discretion of the trial court. Its determination on such examination is final, except in a clear case of an abuse of its discretion." In this case the child was four years and nine months old when the offense of which she testified was committed, and at the time of testifying five years and five months old. Where a girl eight years old had been to school and who upon being examined as to her competency stated that she knew she should tell the truth and that if she did not God would punish her, it was held that she was properly permitted to testify. State v. Sawtelle (N. H.), 32 Atl. Rep. 831. A child thirteen years old is competent to testify where she knows it is wrong to swear falsely, and who is properly instructed by the court as to the consequences of falsely testifying. McAmore v. Wiley, 49 Ill. App. 615. An infant ten years old who has been taught that it is wrong to tell a lie and that those who should swear falsely will be punished (People v. Linzey, 79 Hun, 23), a negro child who was chief prosecuting witness in a felony case upon being asked on her *voir dire* what would become of her if she should swear falsely, replied that she would go to jail here and to hell when she died. The witness was held to be competent, the court very properly remarking that "there is no better test as to apprehend results of falsehood. Comer v. State, 20 S. W. Rep. 547. Indeed the "nature of an oath" seems to have been admirably comprehended in the simple answer of this little negro. A boy twelve years old who stated on examination that it was wrong to tell a lie and if he should do so he would be punished, is a competent witness. Parker v. State, 21 S. W. Rep. 604. Likewise a witness nine years old who has never been in court and can't tell when he was born but knew that an oath was administered to insure the telling of truth, is competent where his evidence showed a degree of intelligence satisfactory to the trial judge. State v. Doyle, 17 S. W. Rep. 751. In a case where a boy and a girl, aged eleven and nine, respectively, were prosecuting witnesses in a felony trial, they were both found to be of sufficient capacity to testify. The court thus disposed of the question: "No fixed rule can be laid down as to the age a child must be to entitle it to testify in a court of justice. The question of competency of a person to be a witness must be left to the sound legal discretion of the trial judge, leaving to the jury to determine the credit that ought to be given to the testimony." Davis v. State, 31 Neb. 247. A boy twelve years of age who possesses the average intelligence of a boy of this age and who satisfies the court that he comprehends the obligation of an oath is competent. State v. Severson, 79 Iowa, 750. And in Missouri where there is a statute provides that "a child under ten years of age incapable of receiving just impressions of the facts respecting which they are examined or of relating them truly," the court held that in law a child not ten years old is under this statute, presumptively incompetent, but that the issue of such competency is peculiarly one for the trial judge, and not for the jury, and the lower court having permitted the witness to testify after objection by reason of his youth, that this was equivalent to a ruling that the court was satisfied upon inspection and observation that he was competent under the statute. Ridenhour v. Kansas City Cable Ry. Co., 102 Mo. 270. In a proper case a young witness may be instructed under the supervision of the court as to the effect, solemnity and consequences of an oath. This is usually done before the witness testifies before the grand jury, but may be done after indictment. Commonwealth v. Lynes, 142 Mass. 577. It is even within the discretion of the court to continue a case with directions that the child should in the meantime be properly instructed. Holst v. State, 23 Tex. App. 1; Taylor v. State, 22 Tex. App. 529; Commonwealth v. Lynes, 142 Mass. 577. If the witness offered understands the nature of an oath he is competent though but nine years old. It is not necessary that he knows what becomes of any one who swears falsely or the effect of an oath. Moore v. State, 79 Ga. 498. The question of competency is one for the court, and not for the witness himself. *Id.;* State v. Michall, 37 W. Va. 565. That the court should be first satisfied of the competency of a witness only seven years old from proper examination is essential, and to permit a child of such tender years to testify without an examination into her competency is reversible error. Hughes v. Ry. Co., 65 Mich. 10. But if the competency of the witness sufficiently appears during the examination upon the stand to the satisfaction of the court this will suffice though there was no examination beforehand. State v. Douglas, 53 Kan. 669. But a child five years old who has no conception of the Deity or of a future state is not competent, though in answer to questions propounded by the court she stated that she would go to jail and the bad man would get her. State v. Michall, 37 W. Va. 565. Under a statute of Texas which provides that "children or other persons who, after being examined by the court, appear not to possess sufficient intelligence to relate transactions with respect to which they are interrogated or who do not understand the obligation of an oath," are incompetent to testify, it was held in a capital case that a boy of eleven years possessing average intelligence though he did not comprehend the obligation of an oath, but knew it was wrong to tell a lie, and right to tell the truth, was competent, the trial judge having satisfied himself of his competency by an examination. Hawkins v. State, 27 Tex. Civ. App. 273. But where an infant of tender years is offered as a witness, and upon examination in open court he or she is found not to comprehend the nature and obligation of an oath, it was held error in a felony case for the witness to be taken to the office of one of the attorneys for the prosecution, and there instructed as to the nature,

obligation and consequences of an oath to the defendant. Taylor v. State, 22 Tex. App. 529. Where a child was in her sixth year at the time of the events she testified about, and barely seven when offered as a witness, who did not know that she had been sworn when she held up her hand and the oath was administered to her; did not know how old she was; had never been to school; did not know what would be done with her if she should tell a story in the court house, nor where she would go if she should be a bad girl and die, she was held incompetent as a witness in a criminal case under the Texas statute above mentioned. Holst v. State, 23 Tex. App. 1. A child but little over nine years old was offered as the principal witness in a murder case. Upon objection to his testimony by reason of his age, and that he was a deaf mute, it appeared that the transactions of which he was to testify took place a few months before he was nine; that he had never been to school for the deaf and dumb; that he could not tell what would be done with him if he should tell an untruth as a witness; could not be made to understand that he would be punished if he should swear falsely; it could not be ascertained from the boy what he was doing at the place of the murder, and who could only make known that the murder was committed, who were killed, and who did the killing, and nothing more. It was held upon appeal, by a divided court, reversing the court below, that the witness was not competent because of a lack of necessary understanding. Territory v. Duran, 3 N. M. 134. This result is doubtless proper. For while the innocence and want of designing and unscrupulous purposes in testifying tends, in a sense, to make the very childishness of a witness a kind of protection against perjury, yet it is necessary for the courts to ascertain by the known and approved methods, that a child, offered as a witness, possesses sufficient intelligence and understanding as to the facts, as well as such an apprehension of the evil and dire consequences of giving false testimony as would be necessary in other witnesses. An oath to a child is often more sacred and fearful than to an adult. They know little of the falsehoods of the world and present a pleasing instance of the adage, that to the pure all things are pure. Indeed the confiding innocence and purity of purpose of a child is proverbial, and is instanced and commended in the Holy Writ.

Nashville, Ark. W. C. RODGERS.

JETSAM AND FLOTSAM.

THE NATURE OF RAILROAD TICKETS.

Two recent cases in minor courts bring up interesting questions concerning the nature of railroad tickets. In Evansville & T. H. R. R. Co. v. Cates, 41 N. E. Rep. 712, the Appellate Court of Indiana held that where a passenger demands and pays for a ticket to A, and by a mistake of the ticket agent is given a ticket to B only, with which he enters the train without noticing the error, he has a right to ride to A on making proper explanation to the conductor, and can recover from the company for ejection by the conductor at B. This case is not without support (see Georgia R. R., etc. Co. v. Dougherty, 86 Ga. 744; 3 Wood on Railroads, § 349), but the weight of authority is against it, and it seems to have no foundation in principle. It involves a misconception of the true character of a railroad ticket. If it were true that the passenger made his contract with the ticket agent and the ticket was handed over merely as a receipt, then he would perhaps have had a contract right to be carried to his intended destination. But, as was pointed out in 1 Harvard Law Review, 17, the ticket agent has no authority to make contracts, his duty is merely to sell tickets. The ticket is the contract, and by its terms the passenger is bound; and in a case like that under discussion, while he doubtless has a right of action against the company for selling him the wrong contract, he has no action for being put off the train at the terminus provided by that contract.

Courts have fallen into error, it would appear, from failure to distinguish between the case of a ticket which is, on its face, not good for the journey intended by the passenger, and that of a ticket which is apparently good for the intended journey, and declared to be so by the ticket agent, although by the regulations of the company it is in fact not good. In the latter case the contract is ambiguous, and the passenger, under the circumstances, surely has a right to insist on the interpretation given by the company's agent; but that is no reason why he is not bound by the ticket in the former case, where the interpretation of the contract is perfectly clear. (See Hutchinson on Carriers, § 580*j*.)

The analogy between railroad tickets and bills and notes has often been remarked, and is treated of at length in the article in the *Harvard Law Review* referred to above. A ticket is not a consensual but a formal contract; and although assignable in the absence of words of limitation, it is, like other negotiable instruments, not assignable in part. The second of the two recent cases is of note in this connection. In Curlander v. Pullman Palace Car Co., a case decided in the Superior Court of Baltimore, and reported in 28 *Chicago Legal News*, 68, the novel question was raised as to the right of a purchaser of a sleeping car section, who leaves the train before reaching his destination, to transfer the use of the section to another passenger for the rest of the journey. The court held that he had that right. This decision can apparently be supported only on the ground that a sleeping car ticket is radically different from a railroad ticket; that it is not a formal contract of transportation, but rather evidence of the purchase of certain space in the sleeping car for the specified journey. The existence of so marked a distinction between the two sorts of tickets may well be doubted.—*Harvard Law Review.*

CORRESPONDENCE.

DETERMINATION OF CONSTITUTIONAL QUESTIONS BY THE EXECUTIVE.

To the Editor of the Central Law Journal:

In the article on the Sugar Bounty Case in the last number of the *American Law Review*, the proposition is advanced that an executive officer can pass on the constitutionality of a statute only in those cases "in which some consequences personal to the individual will attend upon his decision." If, by enforcing the statute, the officer might incur a personal liability for a few cents, he may pass on its constitutionality. If there would be no such personal liability he must enforce the statute as it stands, though its enforcement will result in the loss of thousands of dollars to the people. The result reached should cause one to doubt the reasoning on which the distinction is based. That reasoning is this: The conformity of an act of congress to the organic act is a question of law. The

determination of questions of law is reserved for the courts. If, therefore, there be any case in which an executive officer may pass on the constitutionality of a statute, "that case must be exceptional in its nature, and must be founded upon a special and adequate reason to withdraw it from the general order." Such special and adequate reason is found only in those cases "in which some consequences personal to the officer will attend upon his decision." The construction of a statute is a question of law. The determination of questions of law is reserved for the courts. If, therefore, there be any case in which an executive officer may construe a statute, "that case must be exceptional in its nature, and must be founded upon a special and adequate reason to withdraw it from the general order." Such special and adequate reason is found only in those cases "in which some consequences personal to the individual will attend upon his decision." It is not true that the determination of questions of law is reserved for the courts. In certain cases, the final determination of such questions is reserved for the courts. If the courts sustain a statute, executive officers must enforce it. In advance of a final determination by the courts, the officer must decide for himself. He passes on the constitutionality of the statute "only for the purpose of regulating his own conduct in accordance with the true law." The duty of the officer to the people is of as much importance, at least, as his personal interest. If his private interest will justify him in passing on the constitutionality of the statute, the public interest will also justify him.

BOOK REVIEWS.

WALKER'S AMERICAN LAW.

This is the tenth edition of a work which first made its appearance in 1837 and which was at once accorded a place in American legal literature by the side of Blackstone and Kent. Indeed it may be said to be, in a measure, an American successor to Blackstone, in so far as it applies the principles of the common law to American institutions, as revealed by American authorities. The student of law has found this volume a valuable assistant in his studies as a supplement to Blackstone. It does not seem necessary here to enter into a detailed statement of its contents, for there must be few American practitioners or students who are not familiar with it and aware of its great merit. It will suffice to say that the present edition is revised by Clement Bates of the Cincinnati Bar, and that a few new sections have been added to the text and very considerable additions have been made to the notes. It is in the shape of one volume of eight hundred and fifty pages, well indexed, printed and bound. Published by Little-Brown & Co., Boston.

THOMPSON ON PRIVATE CORPORATIONS.

We have heretofore published an extended review of this masterly commentary on the Law of Private Corporations (41 Cent. L. J. 15). At that time but four volumes had come from the press. The fifth volume is before us. It contains much important and valuable matter. Its main themes are Corporate Powers, the Doctrine of Ultra Vires, Corporate Bonds and Mortgages, Torts and Crimes of Corporations, Insolvent Corporation, Dissolution and Winding Up, and Receivers of Corporations. It is unnecessary to add anything to the very hearty indorsement we gave to the treatise on its first appearance. The enthusiasm with which the work has been generally received by the profession is proof of its intrinsic merit. We dare say that it will ultimately be found in the library of every modern practitioners. We are informed that volume six, which will complete the set, will be issued shortly. Published by Bancroft-Whitney Co., San Francisco, Cal.

DEMBITZ ON LAND TITLES.

This work bears testimony to the long and wearisome labor consumed in its preparation. There is little in the range of subjects embraced in this work which has escaped the diligent study and consideration of the author. In fact, the author's sense of duty to bring the book "down to date" is so high that he seems to regret having omitted the Acts of the State Legislatures passed during the spring and winter of 1895, his manuscript having gone to the publishers "toward the end of June."

As the American law of real estate is, in all its practical workings, the creature of statute, it is questionable whether a survey of the entire law applicable to all the States can be prepared without giving a mass of details of little general value.

The author, however, has arranged the great number of statutes and decisions in a manner unusually satisfactory. Much historical matter is given which can scarcely be found in any other text-book, and throughout the work is characterized by a certain simplicity of style which appeals to the reader in a manner quite unique.

The style has none of the heaviness which characterizes the otherwise authoritative work of Mr. Washburn, if it necessarily lacks the brevity and conciseness of some of the English authors. But brevity and conciseness are impossible where the effort is conscientious to bring the book down to date, for scarcely has the law upon certain important subjects been settled before the legislature has changed it by subsequent enactments. From the irreconcilable conflicting and appalling mass of statutes and decisions it is difficult indeed to form a general statement of the law. Mr. Dembitz has succeeded to a remarkable degree toward approaching this end.

Volume I contains eight chapters, the first being an introduction on the scope of the work, a brief and admirable sketch on the development of English Law in America, and of the other than English sources of the law and chapters on Description and Boundary, Estates, Title by Descent, Title by Grant, Title out of the Sovereign, Title by Devise, and Incumbrances. Volume II contains chapters on Title by Marriage, Powers, the Registry Laws, Estoppel and Election, Judgments Affecting Land, Title by Judicial Process and Title by Prescription, with a list of cases cited comprising some 12,000 cases and an elaborate index of some seventy pages.

So far as we have been able to discover the statutes of all the States have been carefully examined, and this fact will make these volumes acceptable to the profession throughout the United States. The work has no local features, and it would be impossible to discover any preference of examination of the statutes or decisions of any particular State.

A long step towards uniformity of statutes respecting land titles has been taken by the author. There are no great obstacles to the consummation of this uniformity. The citizen of one State now regards the other States as affording quite as desirable fields for investment in real estate as does his own particular State, and such investments would largely increase if the varying and often conflicting statutes were reconciled or removed. The general consensus of the

people is certainly in favor of uniformity, and there are practically no good reasons for the numerous and important differences which now exist. The Code of New York, for example, prepared by David Dudley Field, although at first rejected by his own State, was transplanted to and adopted by California and proved entirely suitable to the conditions there prevailing, and there seems no weighty objection to statutory provisions affecting land titles being the same in Maine as well as in Kansas. One of the greatest benefits of the work of Mr. Dembitz is this guide and impetus towards uniformity of legislation.

The work is encyclopædic in its character, and nothing of any importance has been omitted. The style is lucid and vigorous, and the practitioner with these volumes before him has practically the open sesame to all the law upon the subject.

We heartily commend the work to the profession, to legislators, and to that large number of men engaged in the real estate business who, in its clearly expressed statements, will find a liberal education in this important branch of law. It is a pleasure to state that the references to the reports are remarkably accurate, and that the cases are cited not only in the volume of the State reports, but also in the publications of the West Publishing Company, which makes them accessible to many who have not the different State reports. The publishers have done their work in a very satisfactory manner. These volumes are destined, we believe, to an abiding place in the confidence of the profession. Published by West Publishing Co., St. Paul, Minn.

BOOKS RECEIVED.

Elements of Damages. A Handbook for the Use of Students and Practitioners. By Arthur G. Sedgwick. Boston: Little, Brown & Company. 1896.

The Elements of Torts. By Thomas M. Cooley, LL.D. Chicago: Callaghan & Company. 1895.

Handbook of the Law of Torts. By Edwin A. Jaggard, A. M., LL. B. Professor of the Law of Torts in the Law School of the University of Minnesota. In two volumes. St. Paul, Minn. West Publishing Co. 1895.

Text-Book of the Patent Laws of the United States of America. By Albert H. Walker, of the Hartford Bar. Third Edition. New York: Baker, Voorhis & Company. 1895.

The Principles of the American Law of Bailments. A Companion to the Author's Work on Contracts. By John D. Lawson, LL.D., Professor of Common Law in the University of the State of Missouri. St. Louis: The F. H. Thomas Law Book Co. 1895.

American Electrical Cases, Being a Collection of all the Important Cases (Excepting Patent Cases) Decided in the State and Federal Courts of the United States from 1873 on Subjects Relating to the Telegraph, the Telephone, Electric Light and Power, Electric Railway, and all Other Practical Uses of Electricity, with Annotations, Edited by William M. Morrill, Author of Competency and Privilege of Witnesses," "City Negligence," etc. Volume IV. Albany, N. Y.: Matthew Bender, Law Publisher. 1896.

HUMORS OF THE LAW.

Last week the editor of this paper says: "Edison has been beaten in his phonograph suit."

Too bad Mr. Edison should have received chastisement in the wearing apparel of his most particular fancy. Possibly the assault was spontaneous and he had no chance to change for a more ordinary suit.

"This map of your new railroad is imperfect," said the Judge.

"Imperfect, your Honor?"

"Yes, sir. There's your station, there's your tank, and there's your coal chute. Now, where in thunder is your receiver.

If it is not true, the lawyer who told this story is a good one. Attorney Hogan, it seems, was called some time ago to the county jail by a poor actor who had been arrested for jumping his board bill. He related a pitiful tale of woe, crying at the same time.

"Never mind, my boy," said the genial attorney, "if you cry like that before the jury we have a good case.',

In a jury trial in a small town not many miles from civilization, the rural gentlemen into whose hands the fate of the plaintiff was placed were so stubbornly divided that they were some twenty-odd hours in reaching a verdict. As they left the court after having rendered their verdict, one of them was asked by a friend what the trouble was.

"Waal," he said, "six of 'em wanted to give the plaintiff $4,000, and six of 'em wanted to give him $3,000, so we split the difference an' gave him $500."

A liquor case was on trial, and one of the officers who had made the raid testified that a number of bottles were found on the premises.

"Liquor, your honor."

"What kind of liquor?"

"I don't know, sir."

"Didn't you taste it or smell of it?"

"Both, your honor."

"What! do you mean to say that you are not a judge of liquor?"

"No, sir; I'm not a judge; I'm only a policeman."

The witness was excused from answering any further questions.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMINISTRATION—Executors—Purchasers of Property of the Estate.—Though How. Ann. St. 6042, provides that the executor making a sale shall not be interested in the purchase of any part of the estate sold, and that all sales made contrary thereto shall be void, a reconveyance by the purchaser at an executor's sale to the executor is not void against one claiming thereunder in good faith and without notice.—OTIS v. KENNEDY, Mich., 65 N. W. Rep. 219.

2. ADMINISTRATION — Preferred Claim. — Where an agent collects rents for his principal, deposits the money in bank to his own account, and keeps a running account between him and his principal, which is settled once a year, on the death of the agent the amount due the principal is not a trust fund, which constitutes a preferred claim against his estate.—CHAPPEL v. CRAIG, Iowa, 65 N. W. Rep. 146.

3. ADMINISTRATION—Probate Practice.—A proceeding under Code Civ. Proc. § 1654, providing that any person claiming to be heir to a decedent may file a petition to the probate court praying it to declare the rights of all persons in the estate, is not a civil action, within section 668, requiring that judgments shall be entered in the "judgment book;" and the entry of a decree in such a proceeding in the minute book of the probate court is sufficient.—BLYTHE v. AYRES, Cal., 42 Pac. Rep. 641.

4. ADVERSE POSSESSION—Color of Title.—Where land was sold under an execution, the return to which described the land, gave the purchaser's name, and showed the payment of the purchase price, the purchaser acquired such color of title as would, by adverse possession, ripen into perfect title.—NEAL v. NELSON, N. Car., 23 S. E. Rep. 428.

5. ADVERSE POSSESSION—Continuity.—The mere fact that, while land was held by adverse possession, the United States obtained judgment canceling the patent because of the patentee's fraud, which was afterwards set aside, did not, by revesting the title in the United States, destroy the rights acquired by such possession against the patentee and his successors, so that the statute of limitations would run against the patent title only from the time of setting aside the judgment, where the possession was uninterrupted while the judgment was in force.—CASEY v. ANDERSON, Mont., 42 Pac. Rep. 761.

6. ADVERSE POSSESSION—Mistake as to Title.—One settling on land to acquire it under the homestead statute, erroneously believing it to be vacant public land, may, by such occupancy, acquire title by adverse possession against the true owner.—LONGLEY v. WARREN, Tex., 33 S. W. Rep. 304.

7. APPEAL — Bond — Obligees.—One of several joint judgment defendants in an action of debt in justice court, may, when such defendants are not adversely interested, appeal without making his codefendants obligees in his appeal bond.—MARTIN v. LAPOWELL, Tex., 33 S. W. Rep. 300.

8. APPEAL — Costs—Briefs.—Under Code Civ. Proc. 1887, § 494, providing that there shall be allowed to the prevailing party in the Supreme Court his necessary disbursements in the action, a party is entitled to the cost of printing his brief.—RYAN v. MAXEY, Mont., 42 Pac. Rep. 760.

9. APPEAL—Mandate. — Where a case is remanded with specific directions, the court below has no power to do anything not authorized by such directions.—REES v. MCDANIELS, Mo., 33 S. W. Rep. 178.

10. APPEAL—Notice.—Where, in an action to foreclose a mortgage, the contract is found usurious, and judgment rendered, as provided by Hill's Ann. Laws, § 3589, in favor of the State for the use of the common school fund, the State does not thereby become a "party" to the action, so as to require notice of appeal to be served on the State.—BARGER v. TAYLOR, Oreg., 42 Pac. Rep. 615.

11. APPEAL — Parties.—Parties defendant who were dismissed from the action before the cause was submitted to the jury, without the consent of plaintiff, are necessary parties to an appeal by their codefendants. —CASEY v. OAKES, Wash., 42 Pac. Rep. 621.

12. APPEAL—Review.—A judgment in a law action tried by the court, where no objections were made and exceptions saved to any ruling of the court, and no instructions were asked or given, will not be reviewed. —HILL v. KINGSLAND, Mo., 33 S. W. Rep. 162.

13. APPEAL—Time of Taking.—Code, art. 5, § 6, provides that appeals from a court of law shall be taken within two months from the date of the judgment: Held that, where a verbal order for an appeal is given out of court and after the expiration of the term, the entry of the appeal must be made within the time limited by statute, or the appeal will be dismissed.—GAINES v. LAMKIN, Md., 33 Atl. Rep. 459.

14. APPEAL FROM PROBATE—Judgment.—A judgment of distribution of a decedent's estate will not be disturbed on appeal by a person not interested in the estate.—IN RE BLYTH'S ESTATE, Cal., 42 Pac. Rep. 643.

15. ASSIGNMENT FOR BENEFIT OF CREDITORS—Where an assignee for the benefit of creditors, knowing that the trust property is subject to liens in an amount greater than its value, invokes the aid of equity in the settlement of the trust, the property so incumbered cannot be charged with any costs which would not necessarily have been incurred by the lienholders had no suit been brought by the assignee.—KENTUCKY NAT. BANK v. LOUISVILLE BAGGING CO., Ky., 33 S. W. Rep. 101.

16. ASSIGNMENT FOR BENEFIT OF CREDITORS.—Though an assignor for the benefit of creditors expressly reserves his exempt property, and retains the proceeds of sales made on the day of the assignment to an amount legally exempt, the deed of assignment will be declared void at the instance of creditors, unless the sum so retained was selected by the assignor himself as exempt property. — MAHORNER v. FORCHEIMER, Miss., 18 South. Rep. 570.

17. ASSIGNMENT FOR BENEFIT OF CREDITORS—Retention of Rent.—Since a deed of assignment purporting to convey all the assignor's lands, tenements, and "hereditaments" carries with it, as a necessary incident, the rents of the lands conveyed, the retention of notes given for rent, and their subsequent delivery by the assignor to a third person, is ineffectual to defeat the assignee's rights thereto, and does not, therefore, affect the validity of the assignment.—ALLEN v. SMITH BROS. CO., Miss., 18 South. Rep. 579.

18. ASSIGNMENT FOR BENEFIT OF CREDITORS—Unlawful Preferences.—Where an insolvent corporation aids and abets in the issuance and levy of attachments by certain creditors, and assigns certain choses in action, while executing a general assignment, resulting, in a

few moments after levy of the attachments, in its actual execution and delivery, the attachments and levies and the assignment of the choses in action constitute a part of the general assignment.—POLLAK CO. v. MUSCOGEE MANUF'G CO., Ala., 18 South. Rep. 611.

19. ATTACHMENT—Lien — Prior Unrecorded Deed.—Under Sayles' Civ. St. art. 4332, providing that all sales of land shall be void, as to creditors without notice, unless they are recorded, one who claims under an attachment levied before a prior deed was recorded has the burden of showing that when the attachment was levied he had no notice of the deed.—L. & H. BLUM LAND CO. v. HARBIN, Tex., 33 S. W. Rep. 153.

20. ATTACHMENT—Summons—Service on Corporation.—Under Code Civ. Proc. § 638, providing that personal service of the summons must be made on a defendant on whom an attachment is granted within 30 days of the granting thereof, leaving a copy of the summons, complaint, and other papers, on which an attachment was granted against a corporation, with the person in possession of the property levied on, is not sufficient service of the summons, though such person loaned the papers to defendant's general manager, who notified its directors and attorney of the levy.—KIELEY v. CENTRAL COMPLETE COMBUSTION MANUF'G CO., N. Y., 42 N. E. Rep. 260.

21. ATTORNEY—Compensation—Lien on Judgment.—Though Gen. St. § 85, gives an attorney a lien on a judgment recovered by him for fees due from the judgment creditor, a judgment debtor who pays the judgment without notice of the attorney's intention to claim the lien will be protected against it.—COLORADO STATE BANK OF DURANGO v. DAVIDSON, Colo., 42 Pac. Rep. 687.

22. BANKS—Officer—Liability for Deposits.—A bank depositor, on rumors of its insolvency, went to withdraw his deposits, but was informed by the vice-president and director that the bank was perfectly solvent, and that "we have got all the money you want. You need never have any fears of this bank as long as I am in it." Such depositor, relying on such representations, permitted his deposits to remain. It was in fact insolvent when the representations were made: Held, that such vice-president and director was personally liable to such depositor for the money lost by the failure of the bank.—TOWNSEND v. WILLIAMS, N. Car., 23 S. E. Rep. 461.

23. BUILDING AND LOAN ASSOCIATIONS—Insolvency.—In case of the insolvency of a building and loan association, borrowing members should be charged with the amount actually received by them, with 6 per cent. interest, and credited with the amount paid by them, whether paid as fines, penalties or weekly dues.—STRAUSS v. CAROLINA INTERSTATE BUILDING & LOAN ASSN., N. Car., 23 S. E. Rep. 450.

24. CARRIERS — Live Stock — Contract — Measure of Damages.—The measure of damages to a shipment of cattle, from negligence of the carrier, is the difference between their value in the condition in which they arrive and that in which, but for the negligence, they would have arrived, though they are not shipped for sale, but for pasturage.—GULF, C. & S. F. RY. CO. v. STANLEY, Tex., 33 S. W. Rep. 110.

25. CARRIER—Negligence of Connecting Carrier.—As Rev. St. 1889, § 944, provides that, whenever any property is received by a carrier for transportation from one place to another, such carrier shall be liable for the negligence of any other carrier to which such property may be delivered, a carrier contracting to transport cattle to a point beyond the terminus of its line cannot, by contract, exempt itself from liability for the negligence of the carrier completing the transportation.—MCCANN v. EDDY, Mo., 33 S. W. Rep. 71.

26. CARRIERS OF PASSENGERS—Exemplary Damages.—Exemplary damages will not be awarded against a railway company because, by reason of a breaking down of a defective engine, it failed to carry a passenger to whom it had sold an excursion ticket back to his starting point, though the company's equipments were inadequate, as the passenger's action is *ex contractu*, and not in tort, no personal injury or indignity being inflicted on him.—HANSLEY v. JAMESVILLE & W. R. CO., N. Car., 23 S. E. Rep. 443.

27. CHATTEL MORTGAGE—Execution Purchaser With Notice.—A chattel mortgagee cannot subject to his mortgage part of the mortgaged property held by one as purchaser at an execution sale, made with notice of the mortgage, when the property was in possession of the mortgagor, where the property had already been received by the mortgagee, together with that held by him under replevy bond, and on which the mortgage was a lien, and is sufficient to satisfy the mortgage debt.—ROSE v. MARTIN, Tex., 33 S. W. Rep. 284.

28. CONSTITUTIONAL LAW—Delegation of Legislative Power—Municipal Charters.—Act March 4, 1895, conferring upon cities of a given class the right to make laws for their local self-government, subject to the general laws of the State, is not invalid as a delegation of legislative powers.—REEVES v. ANDERSON, Wash., 42 Pac. Rep. 625.

29. CONSTITUTIONAL LAW—Form of Indictment—Embezzlement.—2 How. Ann. St., § 9421, providing that the indictment may merely allege the embezzlement of money, under which a conviction may be had for the embezzlement of a check, draft, etc., is not unconstitutional in that the indictment does not advise defendant of the charge against him, defendant having the right to have the charge made certain by examination or bill of particulars.—PEOPLE v. HANAW, Mich., 65 N. W. Rep. 231.

30. CONSTITUTIONAL LAW—Statutes—Title of Act.—Act March 3, 1869, entitled, "An act to regulate the sale of tickets, the rate of fare to be charged, and taxes and licenses to be paid by street railroad companies in the City of St. Louis," in providing, in section 4, that "each car shall be furnished with such adjustable gates or guard" as shall effectually prevent passengers from getting on or off by the front platform, violates Const. art. 4, § 32, providing that no law shall relate to more than one subject, and that shall be expressed in its title.—WITZMAN v. SOUTHERN RY. CO., Mo., 33 S. W. Rep. 181.

31. CONTRACT—Agreement to Pay Draft.—One who writes another, at a certain city, "If you are still there and need the money, you can make draft on me for $500 and I will pay it," without indicating the city to which it is addressed, is liable to a bank cashing the addressee's draft, though it is drawn in a city other than that to which the letter was addressed, and the letter was written in reply to one from the addressee asking for funds to enable him to leave the city to which the letter was addressed; the bank having no notice of the purpose for which the money was to be used or the city to which the letter was addressed.—POSEY v. DENVER NAT. BANK, Colo., 42 Pac. Rep. 684.

32. CONTRACT—Ambiguities.—Where a contract is concluded between the parties by letters, if, in a letter written by one of them, there be any ambiguity or contradiction in terms, doubts as to its meaning will be resolved against the writer.—GRAFF v. D. M. OSBORNE & CO., Kan., 42 Pac. Rep. 704.

33. CONTRACT—Breach—Measure of Damages.—Where, in consideration of extension of time to pay purchase money of mining property, the vendee gives notes secured by deed of trust on the property, and agrees with the vendor that he will, till payment of the debt, work the mine in mine fashion, the measure of damages for breach of such agreement, for which the vendor only has a cause of action, is the injury to the security.—BELMONT MINING & MILLING CO. v. COSTIGAN, Colo., 42 Pac. Rep. 647.

34. CONTRACT—Consideration.—Held, that there was a good consideration—the compromise of a disputed claim—for the execution by defendant and delivery to plaintiff of an agreement to make a grain separator, previously purchased by the latter, fulfill and comply with the terms of a warranty given when the separator

was ordered.—HANSEN v. GAAR, SCOTT & CO., Minn., 65 N. W. Rep. 254.

35. CONTRACT—Evidence.—In an action on a contract, evidence that the contract was filed in a prior action before a justice, since deceased, and that his successor, the custodian of his docket, and counsel were unable, after search, to find it, rendered a copy of the contract admissible.—STANLEY v. ANDERSON, Mich., 65 N. W. Rep. 247.

36. CONTRACT—Written Contract—Parol Evidence.—It may be shown by parol that a written contract was discharged by a new, additional or substituted agreement.—CALLIOPE MIN. CO. v. HERZINGER, Colo., 42 Pac. Rep. 668.

37. CONTRACT TO SINK WELL—Performance.—In an action on a contract by which plaintiff agreed to sink a well on defendant's land which would furnish sufficient water for defendant's stock, but which contained no stipulation as to the quality of the water, plaintiff can recover on proof that the agreed quantity was furnished, though the water was not suitable for the stock to drink.—BLUM v. BROWN, Tex., 33 S. W. Rep. 145.

38. CONVERSION—What Constitutes.—Where a person sends a draft to a corporation, to be discounted, and the proceeds used to pay a note of the corporation on which the sender was liable as indorser, and the president of the corporation, though ignorant that the draft was sent for such purpose, uses the proceeds to pay other debts of the corporation, he is liable to the sender for conversion of the draft.—KIDDER v. BIDDLE, Ind., 42 N. E. Rep. 293.

39. CORPORATIONS—By-law—Voting by Stock.—A corporate by-law providing that, "at stockholders' meetings, each stockholder shall cast one vote for each share of stock owned by him," is valid, particularly as Const. § 207, authorizes the cumulative system of voting.—PROCTOR COAL CO. v. FINLEY, Ky., 33 S. W. Rep. 188.

40. CORPORATIONS—Deceased Stockholder.—The summary proceeding by execution to enforce the individual liability of a stockholder in an insolvent corporation, cannot be employed to enforce such liability against the estate of a deceased stockholder, which is in course of settlement in the probate court.—ACHENBACH v. POMEROY COAL CO., Kan., 42 Pac. Rep. 784.

41. CORPORATION—Dissolution.—Though the shares of a corporation, after its creation, may be held by a less number of shareholders than that which the law would have required as a condition precedent to the organization of the same corporation, the corporation continues to exist. Neither the want of officers by reason of failure to elect or by death, nor the burning of the mill which it was the object of a corporation to carry on, will, of themselves, work a dissolution of the corporation.—IN RE BELTON, La., 18 South. Rep. 642.

42. CORPORATIONS—Foreign Insurance Companies—Service of Process.—When a foreign insurance company has filed with the superintendent of insurance of this State, as required by the statute, its written consent that an action may be commenced against it by the service of process upon such superintendent, and it thereafter does business in this State because of the permission so obtained, it is estopped from questioning the jurisdiction of a court acquired by the issuance of a summons to, and its service on, the superintendent of insurance, in the form and manner prescribed by such statute.—LONG ISLAND INS. CO. v. GREAT WESTERN MFG. CO., Kan., 42 Pac. Rep. 738.

43. CORPORATIONS—Insolvency—Equity Jurisdiction.—The property of an insolvent corporation is not a trust fund in the hands of the corporation, for its creditors, so as to give equity jurisdiction to administer it as a trust estate.—BARRETT v. POLLAK CO., Ala., 18 South. Rep. 615.

44. CORPORATIONS—Transfer of Stock.—Under Gen. St. § 269, providing that no transfer of stock shall be valid unless it shall be entered on the books of the company within 60 days from its date, a charge that a sale and delivery of stock without transfer on the books of the company within 60 days is good as to all persons having notice thereof was error, on an issue between an attaching creditor of the person in whose name the stock stood and a purchaser of the stock; the only demand by the purchaser for an entry of the transfer having been made before some of the stock had been assigned to him and before certificates for the rest had been issued.—FIRST NAT. BANK OF LONGMONT v. HASTINGS, Colo., 42 Pac. Rep. 691.

45. CORPORATIONS—Venue of Action—Residence.—A corporation is not a citizen, inhabitant, or resident of a State in which it has not been incorporated, within the meaning of Act Aug. 13, 1888, ch. 866, requiring a civil suit to be brought in the district of which defendant is an inhabitant, or, where the jurisdiction is founded on diverse citizenship, in the district of the residence of either plaintiff or defendant.—IN RE KEASBEY & MATTISON CO., U. S. S. C., 16 S. C. Rep. 273.

46. CORPORATIONS—Water Companies—Forfeiture of Charter.—The failure of a water company to elect directors or officers, or to hold any meetings, or to perform any corporate act, for nearly eight years, and an attempt to sell and surrender all its property to another corporation, is a willful violation of corporate duties, entitling the State to demand a forfeiture of its charter.—CITY WATER CO. v. STATE, Tex., 33 S. W. Rep. 259.

47. COURTS—Judges—Disqualification.—A judge of the court of civil appeals, who is a taxpayer in a certain city, is not interested in an action against such city for personal injuries caused by its negligence, within the meaning of Const. art. 5, § 11, providing that no judge shall sit in any case in which he may be interested.—CITY OF DALLAS v. PEACOCK, Tex., 33 S. W. Rep. 220.

48. COURTS—Liability for Judicial Acts.—A mayor is not civilly liable for ordering the imprisonment of a person for contempt, while acting as judge of the mayor's court, though the order was erroneous, and made through malice.—SCOTT v. FISHBLATE, N. Car., 23 S. E. Rep. 436.

49. CREDITORS' BILL—When Lies.—An action in the nature of a creditors' bill may be maintained under section 481 of the Civil Code, for the purpose of subjecting to the payment of a judgment a county warrant in the hands of a county clerk, which cannot be reached by an execution, or by the ordinary proceedings in aid thereof; but, before the judgment creditor can avail himself of such remedy, it must appear that the debtor has no personal or real property, subject to levy on execution, sufficient to satisfy the judgment.—CLARKE v. BERT, Kan., 42 Pac. Rep. 738.

50. CRIMINAL EVIDENCE—Abortion.—Defendant and L, were jointly charged with manslaughter by abortion committed at L's house. There was evidence that the premature birth resulted from accidental causes, and the evidence of guilt was circumstantial: Held, that it was not error to admit evidence that defendant produced other abortions at L's house within about a year previous to the one charged.—PEOPLE v. SEAMAN, Mich., 65 N. W. Rep. 203.

51. CRIMINAL EVIDENCE—Assault—Intention.—In a prosecution for aggravated assault by a teacher on his pupil, the evidence showing that the assault was so severe as to draw blood from the pupil in a number of places, the pupil offering no resistance, evidence of the intention of the teacher in chastising the pupil is admissible.—KINNARD v. STATE, Tex., 33 S. W. Rep. 234.

52. CRIMINAL EVIDENCE—Confession.—Voluntary testimony given by one to escape liability in a civil action against him for embezzlement is admissible in a criminal prosecution therefor; Code Proc. § 1308, providing that a confession under inducement is admissible.—STATE v. HOPKINS, Wash., 42 Pac. Rep. 627.

53. CRIMINAL EVIDENCE—Confessions.—Where a wife, on threats of her husband to leave her, confesses to having committed incest, such confession, being a con-

fidential communication, is inadmissible, and its subsequent repetition to a third party, under similar threats, in the presence of the husband, is incompetent.—STATE v. BRITTAIN, N. Car., 23 S. E. Rep. 483.

54. CRIMINAL EVIDENCE—False Pretenses.—On a trial for obtaining money by falsely representing that defendant was agent for a collection company which had a branch office at Lexington, testimony that the witness was informed by the police that there was no such office there is incompetent.—QUICK v. COMMONWEALTH, Ky., 33 S. W. Rep. 77.

55. CRIMINAL EVIDENCE — Robbery — Conspiracy. — Where there is evidence that several persons jointly charged with assault in perpetrating robbery were seen together the day before the robbery, on the separate trial of one, evidence of the condition of another the day after the robbery, as identifying him, and therefore defendant, as his companion of the day before, as having been engaged in the robbery, is admissible.—PEOPLE v. CLEVELAND, Mich., 65 N. W. Rep. 216.

56. CRIMINAL EVIDENCE — Seduction — Acts of Unchastity.—On a prosecution for defiling a female confided to one's care, evidence that defendant's general character for chastity was bad was not admissible to impeach him as a witness.—STATE v. SIBLEY, Mo., 33 S. W. Rep. 167.

57. CRIMINAL LAW—Conviction—Affirmance.—A conviction for obtaining property by false pretenses, presented for review on transcripts of the record without argument, will be affirmed where the evidence clearly warranted the findings.—STATE v. COOPER, Iowa, 65 N. W. Rep. 155.

58. CRIMINAL LAW—Embezzlement.—In a prosecution under Comp. Laws 1887, § 1770, providing for the punishment of any agent of any corporation who "shall embezzle or fraudulently convert to his own use any money of another which shall come into his possession by virtue of his employment," an indictment alleging that defendant, as agent of an insurance company, received for the company money as premiums for insurance, which he failed to pay over or account for, is insufficient for failure to allege that the money received was in fact the money of the company.—STATE v. STEARNS, Oreg., 42 Pac. Rep. 616.

59. CRIMINAL LAW—Forgery.—An indictment for forgery, which charges an intent to defraud generally, may be sustained by proof that the name signed to the forged instrument was that of a fictitious person.—JOHNSON v. STATE, Tex., 33 S. W. Rep. 231.

60. CRIMINAL LAW—Forgery—Variance.—An information for forgery in the third degree, drawn under section 135 of the crimes act (paragraph 2272, Gen. St. 1889), described the destroyed instruments, by their purport, as two certain promissory notes, one made by "J. S. Reppy," for $80, and the other by "J. L. Cecil," for $75; but the proof was that the $80 note was made by J. I. Rippey, and the $75 note by J. S. Cecil, and that $4 had been paid and credited on the latter. No evidence was offered tending to show the identity of "J. S. Reppy" with "J. I. Rippey," nor that of "J. L. Cecil" with "J. S. Cecil," and objection as to these variances was duly and seasonably urged, but no application was made to amend the information: Held, that the variances, being in no way cured, were fatal.—STATE v. WOODROW, Kan., 42 Pac. Rep. 714.

61. CRIMINAL LAW—Indictment—Amendment. — The indorsement by the grand jury of the indictment as a "thru" bill instead of a "true" bill is merely error in matter of form, and therefore the court may, under Rev. St. § 1064, cause such an indictment, on objection thereto, to be forthwith amended.—STATE v. WILLIAMS, La., 18 South. Rep. 647.

62. CRIMINAL LAW—Judgment—Validity.—After being sentenced to five years' imprisonment, and serving six days, defendant was brought before the court during the same term, and, on his agreeing to pay into court the costs of prosecution judgment was suspended: Held, that the court had power at a subsequent term, on defendant's failure to pay such costs, to sentence him to imprisonment for one year.—STATE v. WHITT, N. Car., 23 S. E. Rep. 452.

63. CRIMINAL LAW—Keeping House of Ill Fame.—A man may be guilty of keeping a house of ill fame, though the illicit intercourse is had only with his wife, and she is the only female inmate.—STATE v. YOUNG, Iowa, 65 N. W. Rep. 161.

64. CRIMINAL LAW — Misdemeanor — Waiver of Jury Trial.—A jury trial cannot be waived in a criminal prosecution for a misdemeanor.—STATE v. TUCKER, Iowa, 65 N. W. Rep. 152.

65. CRIMINAL LAW — Murder — Defense of Dwelling House.—Where deceased, with a weapon in his hands, attacked and entered the dwelling house occupied by defendant and his wife, and defendant retreated to a loft to escape deceased, and deceased first fired at defendant, defendant was justified in taking deceased's life.—SAYLOR v. COMMONWEALTH, Ky., 33 S. W. Rep. 185.

66. CRIMINAL LAW—Murder—Use of Intoxicants.—The use of liquors by one who has contracted an appetite therefor, though such use is involuntary, is no excuse for homicide, if the quantity taken was not sufficient to stupefy him, or cause him to lose control of his faculties.—COMMONWEALTH v. GILBERT, Mass., 42 N. E. Rep. 336.

67. CRIMINAL LAW—Perjury — Circumstantial Evidence.—Though Code Cr. Proc. art. 746, provides that no person shall be convicted of perjury except upon the testimony of two credible witnesses, or of one credible witness corroborated strongly by other evidence, the falsity of the statement can be established by circumstantial evidence, in the manner required by the statute.—PLUMMER v. STATE, Tex., 33 S. W. Rep. 228.

68. CRIMINAL LAW—Rape—Corroborating Evidence.—Under Code, § 4560, requiring, to convict one of rape, that the testimony of the person injured must be "corroborated by other evidence tending to connect the defendant with the commission of the offense," complaint cannot be made of an instruction that the corroborating evidence must be evidence tending to strengthen and corroborate the injured person.—STATE v. FRENCH, Iowa, 65 N. W. Rep. 156.

69. CRIMINAL LAW—Banks—Receiving Deposits—Insolvency.—An indictment under Rev. St. 1889, § 3581, charging a bank officer with receiving a deposit, knowing that the bank was insolvent, is not defective because each count concludes with the words, "did take, steal, and carry away."—STATE v. SATTLEY, Mo., 33 S. W. Rep. 41.

70. CRIMINAL LAW—Robbery.—An information which charges the defendant with having robbed another of a designated sum of lawful money, the currency of the United States, charges astatutory offense, within the intendment of Rev. St. § 810; and, as the consequence is that it, being in the words of the statute, or those certain and equivalent having been employed, is valid and sufficient.—STATE v. HENRY, La., 18 South. Rep. 638.

71. CRIMINAL LAW — Waiver of Jury Trial.—Under Code, § 4347, relating to criminal trials in district courts, and providing that issues of fact shall be tried by a jury, and section 4350, providing that an issue of fact must be tried by a jury of the county in which the indictment is found, a jury cannot be waived in a criminal proceeding prosecuted by indictment.—STATE v. DOUGLASS, Iowa, 65 N. W. Rep. 151.

72. CRIMINAL PRACTICE—Assault With Intent to Rape.—An indictment for assault with intent to rape will not be quashed though intent be not well alleged, as under such indictment he may be convicted of a simple assault.—COMMONWEALTH v. MCCARTHY, Mass., 42 N. E. Rep. 336.

73. CRIMINAL PRACTICE — Burglary.—An indictment under St. § 1164, providing that, if any person shall break into any storehouse, whether such place be or not a depository for goods, with intent to steal, etc., need not allege that there were, at the time of the

breaking, any goods in the storehouse.—HALE v. COMMONWEALTH, Ky., 33 S. W. Rep. 91.

74. CRIMINAL PRACTICE—Charging Several Offenses.—Under Code Cr. Proc. art. 433, providing that an indictment may contain several counts charging the same "offense," a count for burglary and conspiracy to commit the burglary may be joined.—DILL v. STATE, Tex., 33 S. W. Rep. 126.

75. CRIMINAL PRACTICE — Forgery of Check.—Under Rev. St. § 924, making checks subjects of forgery, and section 3247, providing that in an information for forgery it shall be sufficientto set forth the purport and value of the instrument forged, it was not necessary that an indictment for forging a check allege the name of the bank upon which it was drawn.—SANTOLINI v. STATE, Wyo., 42 Pac. Rep. 746.

76. CRIMINAL PRACTICE—Homicide.—Under a statute defining murder as the unlawful killing of a person "with malice aforethought," and murder in the first degree as all murder perpetrated by means of poison, etc., "or by any other kind of willful, deliberate, malicious and premeditated killing," etc., an indictment for murder in the first degree is sufficient which charges that defendant did "unlawfully, willfully, and of his malice aforethought, and after premeditation and deliberation, kill B, by shooting him with a certain gun loaded with gunpowder and leaden bullets, with the felonious intent to then and there kill him, etc.—TURNER v. STATE, Ark., 33 S. W. Rep. 104.

77. CRIMINAL PRACTICE — Robbery. — An indictment alleging that defendants, being armed, made an assault upon a certain person, with the intent to kill and maim said person if he should resist defendants, and that defendants put said person in fear of his life, and did rob said person of certain property, sufficiently charged the crime of robbery, and was not bad for duplicity.—STATE v. CALLAHAN, Iowa, 65 N. W. Rep. 150.

78. CRIMINAL TRIAL—Witness — Credibility.—Where the credibility of a witness is attacked by proof that he has been arrested for a felony, evidence of his good character for truth is admissible.—FARMER v. STATE, Tex., 33 S. W. Rep. 232.

79. CRIMINAL TRIAL—Witness—Impeachment.—It is a general rule that a party cannot impeach the testimony of his own witness.—STATE v. VICKERS, La., 18 South. Rep. 639.

80. DEATH BY WRONGFUL ACT—Damages.—In an action for causing death, an instruction giving in years the life expectancy of deceased, and directing the jury that in estimating actual damages they should consider the probable net earnings of deceased during that period, taking into consideration his habits and capacity to earn, gave undue prominence to the fact of expectancy, separated from the other facts in evidence, as that deceased's health and habits were only fairly good, and that he had been unable to work continuously.—MCCLURG v. INGLEHEART, Ky., 33 S. W. Rep. 80.

81. DEED BY RAILROAD—Description.—A deed by a railroad company describing the property as "all the railroad" of the grantor through certain counties, and "all its lands, and rights of way, depot and depot grounds, together with all the real estate of said railroad company, wherever situated," is sufficient to transfer title to a tract of land in one of the counties named, a part of a larger tract acquired for a right of way, on which the company had placed a depot and tracks.—FORDYCE v. RAPP, Mo., 33 S. W. Rep. 57.

82. DEED—Delivery.—No delivery can be said to have been made of a deed found in the possession of the grantor at the time of his death, accompanied by a letter requesting that it be given to the person named as grantee, after the death of the grantor, without other evidence bearing upon the fact of delivery; and the grantee can take nothing under, and is not entitled to possession of such undelivered instrument.—LAWN v. DONOVAN, Kan., 42 Pac. Rep. 744.

83. DEED—Delivery.—The redelivery of a delivered but unrecorded deed to the grantor, and his destruction of it, do not revest him with the title, in the absence of proof that the grantee redelivered the deed for the purpose of revesting the title, or with the intention of having it destroyed.—GILLESPIE v. GILLESPIE, Ill., 42 N. E. Rep. 305.

84. DEED—Delivery — Presumption.—A deed is presumed to have been delivered at its date.—KENDRICK v. DELLINGER, N. Car., 23 S. E. Rep. 438.

85. DEED—Mineral Rights—Condition Subsequent.—Where a conveyance of mineral rights in land is defeated by the grantee's failure to perform the particular acts stipulated to be done by him in the instrument itself, and which form the real consideration therefor, a re-entry by the grantor is unnecessary.—HAWKINS v. PEPPER, N. Car., 23 S. E. Rep. 434.

86. DEED—Rule in Shelley's Case.—The rule in Shelley's case applies to a deed to persons named, "to have and to hold the same to their use during the term of their natural lives, and then to their heirs after them."—NICHOLS v. GLADDEN, N. Car., 23 S. E. Rep. 459.

87. DEED—Stipulation to Build House—Incumbrance.—A stipulation in a deed that a certain kind of a house would be erected on the premises, and would be placed at a certain distance from the street, with reversion to the grantor, his heirs and assigns, in case of breach, constitutes an incumbrance, and not merely an easement in favor of the grantor's residence, which lay across the street.—LOCKE v. HALE, Mass., 42 N. E. Rep. 331.

88. DEED OF TRUST—Sale Under.—Gen. St. ch. 63, § 22, provides that no sale of land by virtue of a deed of trust to secure debts shall be valid, or pass the title to the property, unless the sale shall be in pursuance of a judgment, or the maker of such deed shall join in a writing evidencing the sale: Held, that such statute does not render void a trustee's sale made without the consent of the grantor's in a trust deed, where it appears from the face of the instrument and the transaction that it was not intended to be a revocable instrument, but was designed to pass the absolute fee, so that the trusts might be executed.—ABBOTT v. YEAGER, Ky., 33 S. W. Rep. 195.

89. DESCENT—Tenants in Common—Dower.—1 Starr & C. Ann. St. ch. 39, § 10, declares that, in case of the birth of a child after a testator has made his will, "the devises and legacies by such will granted shall be abated in equal proportions to raise a portion for such child" equal to what he would receive had no will been made: Held, that where a testator devised land to his wife and three children, and then had a fourth child born to him, such child inherited an undivided one-fourth interest in the land, subject to its mother's dower.—SALEM NAT. BANK v. WHITE, Ill., 42 N. E. Rep. 312.

90. DOWER—Seisin of Husband.—Testator gave property in trust to executors to secure an annuity left his widow and advances to be made to his children, to continue only until his youngest child should become of age, when he directed sufficient property should be set aside to produce the annuity, and the residue thereof divided among the children: Held, that the trust ceased at the majority of the youngest child, and the property then vested in the children, subject to the lien of the annuity in case of a deficiency of personalty, so that the widow of a child dying after that event was entitled to dower in her husband's share.—CLARK v. CLARK, N. Y., 42 N. E. Rep. 275.

91. EJECTMENT—Title—Possession.—A deed without any evidence of the possession, by the grantor, of the premises conveyed, is not sufficient evidence of title to warrant a recovery in an action of ejectment. The giving of a deed to the premises is no evidence of title in the grantor.—FLORIDA SOUTHERN RY. CO. v. BURT, Fla., 18 South. Rep. 581.

92. ELECTIONS—Ballots.—Under a statute declaring that, when one desires to vote for all the nominees of a particular party, he may do so by placing a cross opposite the emblem of the party, but when he desires to

vote a mixed ticket he shall place a cross opposite the names of the candidates for whom he elects to vote, a cross having been put opposite the emblem of a party, and one opposite the name of each of the candidates of such party, with certain exceptions, the ticket will not be counted for candidates of that party against whose names crosses are not put.—YOUNG v. SIMPSON, Colo., 42 Pac. Rep. 666.

93. ESTOPPEL—By Record.—Where land is sold on default in the payment of the purchase price, and the purchaser dies before the sale is confirmed, and the owner agrees in open court that the deed be made to the heirs of the purchaser, he is estopped to afterwards claim that the purchaser purchased under an agreement to reconvey to him on payment of the amount bid.—FLEMMING v. STROHECKER, N. Car., 23 S. E. Rep. 440.

94. EVIDENCE—Cross-examination.—One party having introduced evidence that a certain person signed a paper without reading it, the other party is entitled to question him as to the circumstances under which he signed it, and why he did not read it.—WHITE SEWING MACH. CO. v. HICKS, Tex., 33 S. W. Rep. 137.

95. EXECUTION—Exemptions.—A widow living alone is not the head of a family, within Code, § 3072, permitting a debtor who is resident of this State, and the "head of a family," to hold certain property exempt from execution, though she once had others living with her who depended on her for support.—EMERSON v. LEONARD, Iowa, 65 N. W. Rep. 153.

96. EXECUTION SALE—Bona Fide Purchaser.—A purchaser at execution sale against one to whom real estate has been conveyed through mistake, but without any knowledge, actual or constructive, of such mistake, is likewise entitled to protection as an innocent purchaser.—LUSK v. REED, Fla., 18 South. Rep. 582.

97. FEDERAL COURTS—Diverse Citizenship.—The provision in Act March 3, 1887, ch. 373, as corrected by Act August 13, 1888, ch. 866, that when the jurisdiction is founded on diversity of citizenship, suit shall be brought only in the district of the residence of either the plaintiff or the defendant, confers merely a personal privilege, and the right of a defendant to object that the action is brought in a district of which some of the defendants are not inhabitants, is waived by his entrance of a general appearance without taking the objection.—INTERIOR CONST. & IMP. CO. v. GIBNEY, U. S. S. C., 16 S. C. Rep. 272.

98. FRAUDS, STATUTE OF—Sale of Fixtures.—A sale of a gimmill situated on land is not within the provision of the statute of frauds, requiring the sale of land to be evidenced by a memorandum in writing.—BROWN v. ROLAND, Tex., 33 S. W. Rep. 273.

99. FRAUDS, STATUTE OF—Contract of Employment for One Year.—A contract of employment for one year, to commence when the employee secures a release from a former employment, is not within the statute of frauds, where his release on the date of the contract was a possibility, though not in fact secured till a later date.—BALTIMORE BREWERIES CO. v. CALLAHAN, Md., 33 Atl. Rep. 460.

100. FRAUDS, STATUTE OF—Promise to Pay Debt of Another.—Where plaintiff performed work for one who contracted with defendants to do it, and after the work was completed defendants orally promised to pay therefor, plaintiff cannot recover, though such promise was unconditional.—BIXBY v. CHURCH, Oreg., 42 Pac. Rep. 613.

101. FRAUDS, STATUTE OF—Sale.—In an action for the price of lumber furnished a third person, where the evidence showed merely that after part of it was delivered defendant told plaintiff that he would pay for it, the promise was within the statute.—HENRY v. KIZER LUMBER CO., Tex., 33 S. W. Rep. 278.

102. FRAUDULENT CONVEYANCES.—A deed made in consideration of marriage is valid, as against existing creditors of the grantor, though not delivered until after the marriage is consummated, in the absence of bad faith on the part of the wife.—WOOD & HUSTON BANK v. READ, Mo., 33 S. W. Rep. 176.

103. FRAUDULENT CONVEYANCES—Attachment Lien.—Under Code, § 503, allowing a creditor to attack a fraudulent conveyance of his debtor's property, "or other device resorted to for the purpose of defrauding creditors," and declaring that "the creditor in such case shall have a lien upon the property described therein from the filing of his bill, except as against *bona fide* purchasers before the service of process upon the defendant in such bill," where a creditor attacks fraudulent attachments of his debtor's property, he does not acquire a lien superior to other attachments, the validity of which is not attacked, and which were levied before the filing of his bill.—LEVY v. MARX, Miss., 18 South. Rep. 575.

104. FRAUDULENT CONVEYANCES—Change of Possession.—An insolvent debtor sold to plaintiff his goods, which were capable of speedy removal, but retained possession for two days thereafter, and was apparently carrying on business as before the sale, with the same business sign, until the goods were seized under attachment: Held, that the sale was fraudulent as to creditors of the seller.—STATE v. GOETZ, Mo., 33 S. W. Rep. 161.

105. FRAUDULENT CONVEYANCES—Parties in Pari Delicto.—A party who has conveyed, by bill of sale, his goods, for the purpose of defrauding his creditors, cannot be permitted, in a court of justice, to question the sale, although it appear that no consideration was received therefor.—KAHN v. WILKINS, Fla., 18 South. Rep. 584.

106. FRAUDULENT CONVEYANCES—Subsequent Creditors.—The taking of a note for a debt owing at the time of a voluntary conveyance by the debtor, after the conveyance, in which subsequent indebtedness is also included, does not render the entire indebtedness a subsequent indebtedness, so as to prevent the creditor from suing to set aside the conveyance.—TREZEVANT v. TERRELL, Tenn., 33 S. W. Rep. 109.

107. GUARDIAN—Appointment—Failure to Give Bond.—The appointment of a guardian, who duly takes the oath required, and receives letters of guardianship in due form, issued by the probate court, is not rendered absolutely void by his failure to give a bond, as required by § 7, ch. 46, Gen. St. 1889.—HUNT v. INSLEY, Kan., 42 Pac. Rep. 709.

108. HIGHWAYS—Prescription — Obstruction.—Under Act June 28, 1883, which declares that all roads which have been used by the public for twenty years are public highways, the fact that a road so used for twenty years was originally laid out as a private way makes no difference.—TOWNSHIP OF MADISON v. GALLAGHER, Ill., 42 N. E. Rep. 316.

109. HOMESTEAD—Deed to Wife.—A deed from a man to his wife of land in which he has a homestead estate, does not pass title to such estate, when possession is not abandoned or given pursuant to the deed, since a homestead can be conveyed without change of possession only by deed executed by both husband and wife.—ANDERSON v. SMITH, Ill., 42 N. E. Rep. 306.

110. HOMESTEAD—Tenancies in Common.—A homestead cannot be created by a cotenant in lands held as such cotenant.—ROSENTHAL v. MERCED BANK, Cal., 42 Pac. Rep. 640.

111. HUSBAND AND WIFE—Homestead—Mortgage.—A mortgage by a husband and wife of their homestead to secure a debt of the husband, is void.—ODUM v. MENAFEE, Tex., 33 S. W. Rep. 129.

112. HUSBAND AND WIFE—Sale by Husband—Improvements on Land.—Where husband and wife have made improvements on land, their rights in which, if any, can be protected only by possession, sale of the improvements by the husband alone, accompanied by his putting the purchaser in possession of the land without any objection by the wife, passes whatever interest they have, even if it be admitted that any of their property rights constituted an interest in land.—FOWLER v. BURKE, Wash., 42 Pac. Rep. 624.

113. INJUNCTION—Bond—Damages—Attorney's Fees.—In an action on an injunction bond, plaintiff is entitled to recover as damages the amount paid as counsel fees for services rendered in dissolving the injunction.—BELMONT MINING & MILLING CO. v. COSTIGAN, Colo., 42 Pac. Rep. 650.

114. INSURANCE — Conditions — Waiver.—A condition in a policy that it shall be void if gasoline be "kept, used or allowed" on the premises, does not prevent the keeping in the building of gasoline to be used in filling gasoline torches for use in removing paint from the building in order to repaint it.—SMITH v. GERMAN INS. CO. OF FREEPORT, ILL., Mich., 65 N. W. Rep. 236.

115. INSURANCE — Conditions — Waiver by Agent. — Where a policy provides that no officer or agent shall have power to waive any of its conditions, except by writing, and that no privilege affecting the insurance shall be claimed by the assured unless so written, after it has been accepted by the assured, a parol waiver of any of the provisions of the policy by the agent from whom the insurance was obtained, is a nullity.—EGAN v. WESTCHESTER FIRE INS. CO., Oreg., 42 Pac. Rep. 612.

116. INSURANCE — Defense of Fraud — Proof.—An instruction requiring the facts relied on to prove the defense of fraud in an action on a fire policy to "admit of no other reasonable explanation," is erroneous, since it requires it to be established beyond a reasonable doubt.—KNOP v. NATIONAL FIRE INS. CO. OF HARTFORD, CONN., Mich., 65 N. W. Rep. 228.

117. INSURANCE—Waiver of Conditions.—Where a fire insurance policy required assured to give immediate notice to the company of any loss, and two days after a fire assured notified the company's agent thereof, who notified the company, which sent an adjuster to the scene of the fire, and after the proofs of loss were filed the company demanded further proofs, the condition as to notice to the company was waived.—MILWAUKEE MECHANICS' INS. CO. v. STUART, Ind., 42 N. E. Rep. 290.

118. INTOXICATING LIQUORS—Illegal Sale.—The sale of two pints of whisky, in separate flasks, to the same purchaser, delivered at the same time for the price per quart, is not within Sand. & H. Dig., § 4856, prohibiting sales of liquors in quantities less than one quart.—BACH v. STATE, Ark., 33 S. W. Rep. 210.

119. INTOXICATING LIQUORS—Sale.—In a prosecution for sale of liquors a witness testified that he sent for whisky by defendant; that he told him to bring him some liquor; that he forgot how much money he gave him, but defendant brought him a quart of whisky and that he paid him nothing for bringing it: Held, that the evidence showed a sale by defendant.—STATE v. SMITH, N. Car., 23 S. E. Rep. 449.

120. INTOXICATING LIQUORS—Sales by Social Club.—A club organized, in good faith, for the promotion of social intercourse and the encouragement of literature and art, in selling intoxicants, in a private manner, only to its members and non-resident guests, but not with a view to profit, is not liable for the tax imposed by Sayles' Civ. St. art. 3226*a*, on persons engaged in the occupation of selling liquors.—STATE v. AUSTIN CLUB, Tex., 33 S. W. Rep. 113.

121. JUDGMENT — Collateral Attack. — In a collateral proceeding, a judgment irregularly tendered cannot be assailed on that ground, provided the court which rendered such judgment had proper jurisdiction.—HOUGH v. STOVER, Neb., 65 N. W. Rep. 189.

122. JUDGMENT — Correction — Affidavit for Attachment.—Where, in attachment, a judgment is rendered for plaintiff for his debt, refusing foreclosure of the attachment lien, and overruling a motion to quash the attachment, the court cannot, at a subsequent term, in passing on a motion to correct the entry of judgment, reopen the case, and render another judgment, quashing the attachment.—ROGERS v. EAST LINE LUMBER CO., Tex., 33 S. W. Rep. 312.

123. JUDGMENT — Justice Court. — A judgment of a justice of the peace, though silent as to service of citation, will be presumed to be valid, on collateral attack, until the contrary is shown, either from the record, or by evidence *aliunde*.—HAMREL v. DAVIS, Tex., 33 S. W. Rep. 251.

124. JUDGMENT—Res Judicata.—A former judgment, between the same parties, cannot be held to be *res judicata* upon a matter controverted in a second action, when the causes of action are not the same, and when it does not appear from the face of the record that such matter was determined in the former case, nor that its determination was necessarily involved in the judgment.—SCOTT v. WAGNER, Kan., 42 Pac. Rep. 741.

125. JUDGMENT—Restraining Execution.—In the absence of fraud or mistake, the district court cannot enjoin the collection of a judgment of a county court having jurisdiction of the parties, where both courts have concurrent jurisdiction of the subject of the action. — PUEBLO CHICAGO LUMBER CO. v. DANZIGER, Colo., 42 Pac. Rep. 683.

126. JUDGMENT BY CONFESSION— Enjoining Enforcement. — The enforcement of a judgment entered by confession under Rev. St. § 2896, providing that, on entering such a judgment, plaintiff shall file an answer signed by defendant's attorney, will not be enjoined at the suit of an attachment creditor of defendant merely because plaintiff's attorney signed the name of defendant's attorney to the answer, during the absence of the latter and at his request, where the debt on which the judgment was founded was a valid one.—JOHN V. FARWELL CO. v. HILBERT, Wis., 65 N. W. Rep. 172.

127. JUDGMENT BY DEFAULT — Evidence. — It is not proper to render a final judgment after a default entered in a suit on a bond without the production of the bond, or proper evidence of it, as the original cause of action must be produced on the final hearing, or a proper account made of its absence.—WEST v. FLEMING, Fla., 18 South. Rep. 587.

128. JUDGMENT LIEN—Defective Abstract.—Where a judgment was rendered by a justice against a firm and an individual member thereof, an abstract of said judgment, reciting merely that the plaintiff recovered judgment against the two persons therein named, did not show that a judgment was obtained against either the firm or said member, and the record thereof did not create a lien.—HAMILTON v. BEARD, Tex., 33 S. W. Rep. 252.

129. JUDGMENT LIEN — Homestead. — Where a judgment lien has attached to land, no subsequent occupation of the same as a homestead by the debtor affects the extent or validity of the lien.—ALDRICH v. BOICE Kan., 42 Pac. Rep. 695.

130. LANDLORD AND TENANT — Assignee of Lease.—Where a lessee builds show windows in such manner as would make them part of the realty if built by the owner, but, by agreement with the owner, the lessee has the right to remove them, an assignee of the lease is entitled to their use for the unexpired term without compensation to his lessor. — WELTMAN v. AUGUST, Tex., 33 S. W. Rep. 158.

131. LIBEL — Action by Corporation — Pleading. — A declaration in an action for libel alleged that the publication was made when plaintiff was trying to contract with a city for the construction in it of plaintiff's system of filtration, and falsely stated that alum was used in plaintiff's system, and that it was doubtful whether water having passed through plaintiff's process was healthful: Held, that it was sufficient on demurrer.—MORRISON-JEWELL FILTRATION CO. v. LINGANE, R. I., 33 Atl. Rep. 452.

132. LIBEL—Privileged Communications.—Where an attorney is a candidate for village assessor, words published by a tax payer, charging him with incompetency in his profession, are not privileged.—MATTICE v. WILCOX, N. Y., 42 N. E. Rep. 270.

133. MALICIOUS PROSECUTION—Probable Cause.—Representations made to prosecutor by a brakeman of the train of which accused was conductor, and which had been repeatedly robbed, that on his being detected by

accused while robbing a car he divided the property stolen with accused, shows, as a matter of law, probable cause for the prosecution, irrespective of the truth of such representations.—MEYER v. LOUISVILLE, ST. L. & T. RY. CO., Ky., 33 S. W. Rep. 98.

134. MASTER AND SERVANT—Assumption of Risk.—In an action against a master for injuries received in an accident while driving defendant's horse, due to the viciousness of the horse and rottenness of the harness, it appeared that both defects were known to plaintiff; that defendant, a few days before the accident, promised to get a new harness; and that on the day of the accident, when plaintiff hitched up, there was a new harness in the barn, and no evidence that plaintiff could not have used it: Held, that defendant was not liable.—LEVESQUE v. JANSON, Mass., 42 N. E. Rep. 835.

135. MASTER AND SERVANT—Assumption of Risk.—One employed by the owner of a railroad to repair a bridge under which the road runs, knowing that trains would be operated during the work, and that it would be necessary to work on the track, and clear it of timber when a train approached, who, when a train running 18 miles an hour had approached to within 80 feet of him, untertook, at the call of the engineer, to remove a skid from the track, cannot recover for injuries from being struck by the train.—WRITT v. GIRARD LUMBER CO., Wis., 65 N. W. Rep. 173.

136. MASTER AND SERVANT—Assumption of Risk—Defective Appliances.—Where the servant, in obedience to the requirements of his master, incurs the risk of machinery or appliances, which, although dangerous, are not of such a character that they may not be safely used by the exercise of reasonable skill and caution, he does not, as a matter of law, assume the risk of injury from accident resulting from the master's negligence.—DEHNING v. DETROIT BRIDGE & IRON WORKS, Neb., 65 N. W. Rep. 186.

137. MASTER AND SERVANT—Contributory Negligence.—Where a blow-off pipe from a steam boiler was connected with a manhole, which was also used to clean out a sewer on defendant's premises, an employee, in cleaning out said sewer, in the discharge of his duty, and who knew the condition of things, was guilty of contributory negligence in failing to notify the person having charge of said boiler not to blow off steam.—MCLEAN v. CHEMICAL PAPER CO., Mass., 42 N. E. Rep. 330.

138. MASTER AND SERVANT—Dangerous Appliances—Assumption of Risks.—In an action by a servant for injuries caused by a premature explosion of dynamite while blasting, where it was shown that defendant knew that the tools furnished plaintiff were unsuitable and dangerous, and the evidence as to contributory negligence was conflicting, a verdict for plaintiff will not be disturbed.—OHIO VAL. RY. CO. v. MCKINLEY, Ky., 33 S. W. Rep. 186.

139. MASTER AND SERVANT—Fellow-servants.—A car repairer and a switchman are fellow-servants, within the rule exempting a master from liabilities for injuries sustained by one fellow-servant through negligence of another, unless made so by statute.—SMITH v. CHICAGO, M. & ST. P. RY. CO., Wis., 65 N. W. Rep. 183.

140. MASTER AND SERVANT—Fellow-servants.—A rail. road engineer and a porter on the train are not fellow-servants.—CINCINNATI, N. O. & T. P. RY. CO. v. PALMER, Ky., 33 S. W. Rep. 199.

141. MASTER AND SERVANT — Fellow-servants. — The foreman of a drill crew, who works with the rest of the crew in moving cars in a railroad yard and placing them on floats, and who is subordinate to the yard master, who employs and discharges all employees in the yard, is a fellow-servant of the other members of the crew.—CENTRAL R. CO. OF NEW JERSEY v. KEEGAN, U. S. S. C., 16 S. C. Rep. 269.

142. MASTER AND SERVANT — Negligence — Defective Appliances.—A servant engaged in stringing wires on telephone poles cannot recover from his master damages for injuries received from falling from a tree, by reason of a limb breaking, which he had climbed in order to arrange the wires which passed through the tree.—YEARSLEY v. SUNSET TELEPHONE & TELEGRAPH CO., Cal., 42 Pac. Rep. 688.

143. MECHANIC'S LIEN—Liability of Contractor—Assumption by Owner.—In an action by a material-man against a contractor for lumber furnished for a house, it is no defense that the owner assumed the debt, unless there was a novation which released defendant.—ALDRITT v. PANTON, Mont., 42 Pac. Rep. 767.

144. MINES AND MINING—Location—Conclusiveness of Patent.—The granting by the United States of a patent to a mining claim is conclusive of the sufficiency of the location notice.—CHAMBERS v. JONES, Mont., 42 Pac. Rep. 758.

145. MINING LEASE — Assignment. —Where one to whom an interest in the lease of a mine is assigned agrees to pay all costs and assessments on his own interest and that of his assignor, he is not liable for a deficiency of receipts for a certain month, and incurs no liability if, during the whole period of the lease, there are funds available for expenses.—SHAW v. HORNER, Colo., 42 Pac. Rep. 689.

146. MORTGAGE—Foreclosure.—In this case, which is a bill for foreclosure of mortgage, the evidence summarized, upon which it is held that there can be no doubt that the specific draft claimed to have been secured by the mortgage was paid before suit was brought, and that the proof fails to show that complainant was the holder and owner of such draft, either at maturity or at the time of bringing suit.—PEREZ v. BANK OF KEY WEST, Fla., 18 South. Rep. 590.

147. MORTGAGE—Foreclosure—Transfer of Equity.—After the sale of a lot to the plaintiff upon the foreclosure of its mortgage thereon, the defendant mortgagor, for the sole purpose of extending his time for the redemption of the premises 500 days, procured his equity therein to be transferred to a third party, and received from such party 100 separate and independent mortgages, which were recorded at different hours in the office of the register of deeds of the proper county, and filed therein 100 independent notices of his intention to redeem the lot from such sale: Held, that the mortgages and notices were void as to the plaintiff, a cloud upon its title, and that it can maintain this action for the removal of the cloud.—NEW ENGLAND MUT. LIFE INS. CO. v. CAPEHART, Minn., 65 N. W. Rep. 258.

148. MORTGAGE—Reformation.—The owner of a lot mortgaged it and then conveyed it to a purchaser, who assumed the mortgage. All the parties to these transactions supposed that a house stood on this lot, but the house in fact stood on an adjoining lot, which the purchaser also bought after he had discovered the mistake: Held, that the mortgage should be treated as covering the lot on which the house actually stood, and not the other one.—WAY v. ROTH, Ill., 42 N. E. Rep. 321.

149. MUNICIPAL BONDS—Election.—The validity of municipal bonds is not affected by an apparent irregularity, which does not operate as an evasion of any provision of law, or a departure from the proposition ratified by the voters.—STATE v. MOORE, Neb., 65 N. W. Rep. 193.

150. MUNICIPAL CORPORATIONS—Action to Abate Nuisance.—An incorporated city can maintain an action to abate a nuisance caused by the emptying of a private sewer into a creek running through the city, without regard to trespass on the city's property, or that of any citizen.—CITY OF BELTON v. CENTRAL HOTEL CO., Tex., 33 S. W. Rep. 297.

151. MUNICIPAL CORPORATION—Charter.—The word "charter," as used in Sp. Laws 1891, ch. 6, § 1, may be defined "as the enabling acts under which a municipal corporation exercises its privileges and performs its duties and obligations, including all matters in which the municipality has a direct interest, and the right to regulate and control." These acts must necessarily include all laws relating to the material affairs and

direct interests of the municipality.—STATE v. ERMENTRAUT, Minn., 65 N. W. Rep. 251.

152. MUNICIPAL CORPORATIONS—Defective Sidewalks.—A charge that the duty of defendant to discover the defect was greater than that of an ordinary observer was proper where it was also charged that defendant was not liable for latent defects unless it knew of them, or by reasonable diligence could have known of them.—LYMAN v. CITY OF GREEN BAY, Wis., 65 N. W. Rep. 167.

153. MUNICIPAL CORPORATION—Defective Sidewalk.—Laws 1882, ch. 169 (Green Bay City Charter), requiring a lot owner to keep the sidewalk adjacent to his lot in safe condition, and providing that, if a sidewalk is out of repair, the owner shall be notified by the superintendent of streets, who, if necessary, shall make the repairs at the owner's cost, does not make a lot owner liable for personal injuries caused by a defect in the sidewalk adjacent to his lot.—TOUTLOFF v. CITY OF GREEN BAY, Wis., 65 N. W. Rep. 168.

154. MUNICIPAL CORPORATION — Discretion of City Council.—The power vested in a city council to improve streets will not be reviewed by the courts, except for abuse of discretion established beyond a reasonable doubt.—MORSE v. CITY OF WESTPORT, Mo., 33 S. W. Rep. 182.

155. MUNICIPAL CORPORATIONS—Excavation of Streets—Damages.—Under the constitutional provision that no person's property shall be taken, "damaged" or destroyed for or applied to a public use without adequate compensation being made, where a city, in grading streets, leaves large and dangerous holes in the streets, it is liable to owners of abutting lots for damages, if any, to such lots.—CITY OF SAN ANTONIO v. MULLALY, Tex., 33 S. W. Rep. 256.

156. MUNICIPAL CORPORATIONS—Intoxicating Liquors—Licenses.—An ordinance requiring persons selling liquor in quantities of five gallons or more to take out wholesale dealers' licenses, and excepting from such requirement those who have taken out retail dealers' licenses, is invalid, as making an unjust discrimination between persons within the same class.—CITY OF CAIRO v. FEUCHTER, Ill., 42 N. E. Rep. 308.

157. MUNICIPAL CORPORATIONS—License to Builder to Occupy Street—Agreement to Indemnify City Against Loss—Liability.—One who has executed to a city an agreement, in consideration of a license to a society to occupy part of the street in front of its property, where it was erecting a building, that the society should comply with the terms of the license and indemnify the city from loss by reason of its occupancy, is not relieved from liability because the society did not give a written agreement to the city as required by an ordinance.—CITY OF SPRINGFIELD v. BOYLE, Mass., 42 N. E. Rep. 333.

158. MUNICIPAL CORPORATION—Limitation of Power to Contract.—A city is not liable for an improvement erected according to contract, where the contract was made in violation of a constitutional provision.—NOEL v. CITY OF SAN ANTONIO, Tex., 33 S. W. Rep. 263.

159. MUNICIPAL CORPORATION—Public Improvements—Assessments.—Where the shape and dimensions of a corner lot raise a presumption that it fronts on a particular street while vacant, such presumption continues after it has been improved, unless rebutted by the style and character of the improvements.—CITY OF TOLEDO v. SHEILL, Ohio, 42 N. E. Rep. 323.

160. MUNICIPAL CORPORATION — Sidewalks—Ordinances—Revocation.—An ordinance declaring that no person shall place merchandise on a sidewalk beyond three feet from the front line of the lot, does not vacate the three feet of the sidewalk, but merely grants a revocable license.—CITY OF DENVER v. GIRARD, Colo., 42 Pac. Rep. 662.

161. MUTUAL BENEFIT INSURANCE—Membership Certificate.—In an action by the beneficiary of an insurance certificate against a benefit society, the introduction of the certificate is *prima facie* evidence of decedent's good standing in the society, though an allegation in the complaint that decedent performed all the conditions of the certificate is denied by the answer, which alleges that at the time of his death decedent was suspended from the society for non-payment of assessments.—KUMLE v. GRAND LODGE, ANCIENT ORDER OF UNITED WORKMEN OF CALIFORNIA, Cal., 42 Pac. Rep. 634.

162. NEGLIGENCE—Expert Testimony.—A physician who treated plaintiff after he was run into by defendant's train, and who had stated that plaintiff complained of certain pains, may give his opinion as an expert as to whether plaintiff was injured, and the nature and extent of his injuries, and whether, in his opinion, the complaints were real or simulated; but cannot give as a reason for his opinion his confidence in plaintiff.—AUSTIN & N. W. RY. CO. v. MCELMURRY, Tex., 33 S. W. Rep. 249.

163. NEGLIGENCE—Liability of Receiver.—A receiver operating a railroad under the appointment and direction of a court of equity is within the provisions of Gen. St. 1894, § 2701, known as the "Fellow-servant Act," and is liable to an employee who is injured by the negligence of a co-employee.—MIKKELSON v. TRUESDALE, Minn., 65 N. W. Rep. 260.

164. NEGOTIABLE INSTRUMENT — Action on Forged Note—Ratification.—In an action on a note against the alleged maker it appeared that defendant was president of a bank, and that in his absence the cashier executed the note, put on it the bank's and his own indorsement and sent it to the cashier of another bank; but there was no proof that defendant, the bank, or even the cashier, obtained any benefit from the money obtained for the note by the cashier to whom it was sent: Held, that defendant was not liable on the ground of ratification.—FIRST NAT. BANK OF STEVENS POINT, WIS., v. MARTIN, Kas., 42 Pac. Rep. 713.

165. NEGOTIABLE INSTRUMENT—Action on Note—Defenses.—It is no defense to an action by an innocent purchaser of a note for value against the maker that the payee is a fraudulent association.—REYNOLDS v. ROTH, Ark., 33 S. W. Rep. 105.

166. NEGOTIABLE INSTRUMENT—Bona Fide Holder.—A grantor of land with general warranty cannot claim to be a *bona fide* holder of a note given for the purchase price by a subsequent purchaser, and assigned to her by her grantee in payment for the land, the title to the land having failed.—NATIONAL EXCH. BANK v. JACKSON, Tex., 33 S. W. Rep. 277.

167. NEGOTIABLE INSTRUMENT — Drafts — Dishonor—Notice.—The failure of the holder of a draft to give reasonable notice of dishonor to the drawer and indorser, is not excused by the insolvency of the drawee.—NATIONAL BANK OF ASHEVILLE v. BRADLEY, N. Car., 23 S. E. Rep. 455.

168. NEGOTIABLE INSTRUMENT — Irregular Indorsement—Parol Evidence.—In an action on a note payable to plaintiff's order and signed by one member of a firm individually, parol evidence is admissible to show that an indorsement thereon in the firm name was made before the note was delivered to or indorsed by the payee, thereby fixing the liability of the firm as a co-maker, notwithstanding the words, "We hereby waive notice, demand, protest and all other formalities," were written above such indorsement.—RICHARDSON v. FOSTER, Miss., 18 South. Rep. 573.

169. NEGOTIABLE INSTRUMENT — Promissory Note—Pledge.—Where the maker of a negotiable promissory note pays the same to the original payee without requiring the production and surrender of the paper, he is liable to pay it again to an innocent holder who acquired title to it in good faith and for value, before maturity, unless the payee was the holder's general agent for the collection of such papers, or had special authority to collect in the particular instance, or the money collected in fact reached the holder's hands.—BANK OF THE UNIVERSITY v. TUCK, Ga., 23 S. E. Rep. 467.

170. NEW TRIAL—Review.—Rev. St. 1889, § 2241, providing that "only one new trial shall be allowed to either party, except: First, where the triors of the fact shall have erred in a matter of law; second, where the jury shall be guilty of misbehavior," does not prohibit the granting of a new trial to a party for insufficiency of the evidence to support the verdict, however many new trials may have been granted him on other grounds.—KREIS v. MISSOURI PAC. RY. CO., Mo., 33 S. W. Rep. 64.

171. OFFICE AND OFFICERS—Commissioner of Elections—Misconduct in Office.—In order to properly exercise an executive function, it is often a requisite preliminary to hear evidence to guide and direct the judgment of the executive as to the course to pursue; and it is not necessary, under our constitution, to refer all such questions to the courts.—MCMASTER v. HERALD, Kan., 42 Pac. Rep. 697.

172. OFFICE AND OFFICERS—Eligibility of Minor.—There being no law prescribing the qualifications of deputy county clerk, a minor is eligible to hold the office, and under Sayles' Civ. St. art. 1146, providing that deputies may perform all such official acts as may be lawfully done by the clerk in person, is authorized to administer an oath to an applicant for a marriage license.—HARKREADER v. STATE, Tex., 33 S. W. Rep. 117.

173. OFFICE AND OFFICER—Malconduct in Office.—The charter of the city of Galveston authorizes the city council to remove any officer for malconduct in office: Held that, where such council removed the city recorder for an act which did not constitute malconduct in office, *mandamus* was the proper remedy.—JOHNSON v. CITY COUNCIL OF GALVESTON, Tex., 33 S. W. Rep. 150.

174. OFFICERS—Reward for Arrests.—A town marshal, whose duty it is to make arrests, cannot recover a reward offered for the arrest of persons accused of crime.—RILEY v. GRACE, Ky., 33 S. W. Rep. 207.

175. PARENT AND CHILD—Custody of Child.—While the statute provides that the father, if a suitable person, shall have the custody of the person and the care of the education of his minor child, yet this is not an absolute legal right, beyond the control of the courts.—STATE v. FLINT, Minn., 65 N. W. Rep. 272.

176. PARTITION—Joint Patentees under Parol Contract.—Where several persons occupying separate parts of a tract of public land separately make improvements on the respective parts occupied by them, and take out a patent to the whole tract in their joint names, with the verbal understanding that each shall own in severalty the part occupied by him, and, after the patent is issued, each with the consent of the others, exercises sole control over his separate tract, and pays the taxes thereon, each acquires the equitable title to the tract occupied by him.—MATHES v. NISSLER, Mont., 42 Pac. Rep. 763.

177. PARTITION—Substitution.—In case of the death of a cotenant, his or her heirs or devisees become cotenants with the other joint owners; and, where such death happens during the pendency of a suit for partition, it is necessary that the heirs or devisees be made parties defendant before proceeding with the partition.—LYON v. REGISTER, Fla., 18 South. Rep. 589.

178. PARTITION—Waiver of Homestead.—In an action by a widow for partition of decendent's entire estate, as community property, plaintiff's failure to assert any claim of homestead is a waiver of her homestead rights.—MOORE v. MOORE, Tex., 33 S. W. Rep. 217.

179. PARTITION SALE—Failure to Comply with Bid.—The commissioner appointed in proceedings for partition sale to sell the property may, for the use of the owners of the land, sue the purchaser at the sale, he having refused to complete the purchase.—GRIEL v. RANDOLPH, Ala., 18 South. Rep. 609.

180. PHYSICIANS—Statutory Regulations.—McClain's Code, § 2532, providing that any itinerant vendor of any drug, who shall by writing or printing profess to cure diseases by any drug, shall pay a license fee, does not apply to a regular physician advertising himself as a specialist in certain diseases, and undertaking to effect cures for a certain consideration, because he uses his own medicine, instead of writing prescriptions to be put up by a druggist.—STATE v. BONHAM, Iowa, 65 N. W. Rep. 154.

181. PRESUMPTION—Foreign Law.—It will be presumed, in the absence of proof, that the law of a foreign State is the same as the law of the State where the action is brought.—TEMPLE v. DODGE, Tex., 33 S. W. Rep. 222.

182. PRINCIPAL AND SURETY—Wife as Surety.—A married woman, by signing a note jointly with her husband, and mortgaging her land as security for the loan made to him, does not become the surety of the husband, and personally liable, but the pledge of her estate is valid, and therefore an extension of time granted the husband does not discharge her land from liability for the repayment of the loan.—TIPTON v. TRADERS' DEPOSIT BANK, Ky., 33 S. W. Rep. 205.

183. PROHIBITION—Pleading.—The allegation in the petition of a relator, praying for relief through a writ of prohibition, that he has no remedy in the premises otherwise than through the special relief asked, is a mere conclusion of law, carrying with it no force, in the absence of a statement of facts going to show the correctness of that conclusion.—STATE v. ELLIS, La., 18 South. Rep. 636.

184. PUBLIC LANDS—Relinquishment of Claim.—The filing in the land office in 1864, by one who had entered certain land as a homestead, of a writing, signed by him, stating that he relinquished all his right and title to the land in favor of another person, restored the land at once to the public domain, though the entry was not canceled until 1871.—KEANE v. BRYGGER, U. S. S. C., 16 S. C. Rep. 278.

185. QUIETING TITLE—Evidence of Possession.—A party, by turning a cow into an inclosed lot and removing bill boards therefrom, does not acquire such possession of the land as will sustain an action to remove a cloud from the title.—MCREE v. GARDNER, Mo., 33 S. W. Rep. 166.

186. RAILROAD COMPANIES—Carrying Passenger Beyond Destination.—Where a station is duly called by the brakeman, and a passenger, relying on the promise of the conductor to notify her personally when the train arrived there, fails to hear it announced, and is carried past, her whole attention being occupied at the time by a sick child, the carrier is not responsible, unless the conductor had knowledge of the child's illness, or of the necessity that might require the mother's exclusive attention to its needs, when he made the promise.—CHICAGO, R. I. & T. RY. CO. v. BOYLES, Tex., 33 S. W. Rep. 247.

187. RAILROAD COMPANIES—Electric Street Cars—Contributory Negligence.—Failure of a person to look and listen before crossing the tracks of an electric railway in a public street, where the cars have not an exclusive right of way, is not negligence, as a matter of law.—ROBBINS v. SPRINGFIELD ST. RY. CO., Mass., 42 N. E. Rep. 334.

188. RAILROAD COMPANIES—Fires.—The inference of negligence arising from the fact that the fire was set by sparks from defendant's engine is overcome by undisputed evidence that the engine was properly constructed and equipped, was carefully inspected the day before the fire, and found to be in proper order, and was properly managed.—MENOMONIE RIVER SASH & DOOR CO. v. MILWAUKEE & N. R. CO., Wis., 65 N. W. Rep. 176.

189. RAILROAD COMPANIES—Fire—Pleading.—In an action against a railroad company to recover damages by a fire communicated while the defendant was operating its railroad, where the only fault charged is that "the defendant so carelessly and negligently managed and controlled its locomotive and train that fire escaped therefrom," and the plaintiff proved the setting out of the fire by the defendant's locomotive, it did not then devolve upon the defendant to prove that the locomotive was sufficient, and in good condition and

repair, but only that it was carefully and properly managed and controlled.—ATCHISON, T. & S. F. R. CO. v. AYERS, Kan., 42 Pac. Rep. 722.

190. RAILROAD COMPANIES—Injury to Brakeman—Defective Track.—In an action by a brakeman against a railroad company for injuries from the derailing of an engine by a rock on the track, where it appeared that defendant's road ran through a rocky gorge, subject to rock falls, and that two months prior to the accident blasting, to widen the road, had been done, since which time, up to the accident, trains had been safely run, and there was no evidence as to how the rock got on the track, except that there was a hole in the bluff twelve or fifteen feet from the road-bed, about the size of the rock, which was inspected only from the track, it was error to refuse a nonsuit.—DENVER & R. G. R. CO. v. MCCOMAS, Colo., 42 Pac. Rep. 676.

191. RAILROAD COMPANIES—Injury to Child.—In an action against a railroad company for injuries to a child 10 years old, while playing on cars in its yard, where the complaint alleged that defendant had for a long time allowed children to play in its yard, and there was evidence that plaintiff had previously played there without objection, and that defendant's foreman saw plaintiff there before the accident, and that plaintiff was in view of the engineer of the switch engine which caused it, it was proper to charge that a railway company, in operating its cars, is bound to use ordinary care to avoid injuring a person on its premises by its permission or invitation.—TEXAS & P. RY. CO. v. BROWN, Tex., 33 S. W. Rep. 146.

192. RAILROAD COMPANIES—Injury to Passenger—Contributory Negligence.—The fact that a passenger on a street car, injured by a trapdoor in the floor giving way beneath her, knew when she stepped on it that the car had been stopped a short time before because it was out of order, and saw the trapdoor raised and put back, does not render her guilty of contributory negligence, where the evidence shows that she had no knowledge that the door was defective.—WASHINGTON v. SPOKANE ST. RY. CO., Wash., 42 Pac. Rep. 629.

193. RAILROAD COMPANIES—Killing Stock.—Under Act March 31, 1874 (2 Starr & C. Ann. St., p. 1927), requiring railroad companies to maintain fences on both sides of their tracks, it is no excuse for not fencing a road at a point outside of any municipality that the road can be merely safely and conveniently used if unfenced at that point.—TOLEDO, ST. L. & K. C. R. CO. v. FRANKLIN, Ill., 42 N. E. Rep. 319.

194. RAILROAD COMPANIES—Killing Stock.—Whether a distance of half a mile along the track of a railroad which was not fenced was reasonably necessary for depot grounds, so as to absolve the company from liability for damages for cattle killed on such portion of the track, is a question of fact.—GROSSE v. CHICAGO & N. W. RY. CO., Wis., 65 N. W. Rep. 185.

195. RAILROAD COMPANIES—Right of Way.—Where a right of way of a certain width is conveyed to a railway company, the owner of the fee may put the land to all uses consistent with the exercise by the company of its rights and performance of its duties.—OLIVE v. SABINE & E. T. RY. CO., Tex., 33 S. W. Rep. 139.

196. RAILROAD COMPANIES—Street Railway—Liability for Injuries.—An electric street railway company is not liable, in the absence of a collision with its car, on account of its failure to stop its car, for injuries caused by a horse driven on the street becoming frightened, no unnecessary noise having been made for the purpose of frightening the animal.—DOSTER v. CHARLOTTE ST. RY. CO., N. Car., 23 S. E. Rep. 449.

197. RAILROADS—Sale of Bonds—Mortgage Covenant.—An action to compel a railway corporation to make good its covenant in a mortgage to devote the proceeds of the bonds secured thereby to the improvement of the mortgaged property, for the benefit of future bondholders, cannot, after such bonds are sold under an agreement by which the covenant is in effect abrogated, be maintained in equity by one who subsequently buys some of the bonds in the market, not relying on the mortgage covenant, but upon his own judgment, after full inquiry, with knowledge of the exact situation, and who shows no actual or prospective loss by the transaction.—BELDEN v. BURKE, N. Y., 42 N. E. Rep. 261.

198. REAL ESTATE AGENT—Commissioners.—Where defendant denied that he agreed to pay plaintiffs a commission for selling his property at a certain price, as claimed by plaintiffs, evidence of one to whom defendant had given an option prior to the alleged agreement, that he was able and willing to pay said price without any deduction therefrom, was competent to disprove the contract.—DEXTER v. COLLINS, Colo., 41 Pac. Rep. 664.

199. RECEIVER—Action by Foreign Receiver—Pleading.—A complaint by the receiver of a corporation of another State, appointed by a court of that State, for a debt claimed to be due plaintiff by virtue of his appointment, which does not allege that plaintiff, either by the order appointing him or by the statutes of such State is authorized to sue, does not show that plaintiff has legal capacity to sue.—SWING v. WHITE RIVER LUMBER CO., Wis., 65 N. W. Rep. 174.

200. RECEIVERS—Joinder as Parties.—It is not error to refuse an application to make a receiver of a corporation party to an action by it for injunction begun before his appointment, the application being made, not by him, but by attorneys for the corporation, and just before the cause is to be called for trial, under circumstances that would necessitate its going over the term if the application were granted, though the receiver was appointed six months before, and no excuse is shown why application should not have been made earlier.—ST. LOUIS, C. G. & FT. S. RY. CO. v. HOLLADAY, Mo., 33 S. W. Rep. 49.

201. RECEIVERS—Sale of Business.—In a suit for the dissolution of a partnership, in which a receiver was appointed, the court, *pendente lite*, may order a sale of the business and good will of the partnership, the partnership being insolvent, and the business being carried on by the receiver at a loss.—WULFF v. SUPERIOR COURT OF SAN JOAQUIN COUNTY, Cal., 42 Pac. Rep. 68.

202. REFERENCE—Right to Jury Trial.—Where, against defendant's objection, the issues were sent to a referee for trial, and the referee filed 14 findings of fact, some of which related to questions of fact not in issue under the pleadings, and defendant filed exceptions to the findings, a demand at the end of his exceptions for a jury trial on all the issues raised thereby was too general to entitle him to such a trial.—KEYSTONE DRILLER CO. v. WORTH, N. Car., 23 S. E. Rep. 427.

203. REPLEVIN — Affidavit—Amendment.—Where the original affidavit in an action of replevin contains a defective statement of the necessary averments of the plaintiff's rights or claims, it may be amended, to make clear or certain that which was indefinite or uncertain.—COMMERCIAL STATE BANK v. KETCHAM, Neb., 63 N. W. Rep. 261.

204. REPLEVIN—Parties.—In an action of replevin, the right to the possession of the property is essentially involved, and the party entitled thereto must be the real plaintiff in the suit, and cannot maintain it for the use of another. If a party who sues for the use of another has the legal title, and is entitled to recover in his own name, the fact that a usee's name is inserted in the pleadings should not alone defeat recovery. The usee may be considered as no party to the action, and his name treated as surplusage.—ROOF v. CHATTANOOGA WOOD SPLIT PULLEY CO., Fla., 18 South. Rep. 597.

205. SALE—Conditional Sale.—A written instrument purporting to be a lease of personal property, which states its value, and authorizes the lessor to take possession on default in rent, will be held a contract of conditional sale, where it appears that the rent reserved will in a short time equal the given value of the property.—HAM v. CERNIGLIA, Miss., 18 South. Rep. 577.

206. SALE OF TIMBER—Replevin.—A vendor of standing timber, who retains title to all logs cut from the land, and lumber manufactured from the logs, until the purchase price is paid, may maintain replevin upon the vendee's default in such payment.—HYLAND V. BOHN MANUF'G CO., Wis., 65 N. W. Rep. 170.

207. SCHOOLS — Whipping Scholar — Malice.—An instruction on a prosecution against a teacher for whipping a scholar, declaring him guilty if he inflicted a permanent injury, or did the whipping with malice, is erroneous in defining malice as "bad temper, high temper, or quick temper."—STATE V. LONG, N. Car., 23 S. E. Rep. 431.

208. SLANDER—Malice — Presumption.—A statement that a chaste female "looked like a woman who had miscarried" does not *per se* imply malice.—STATE V. BENTON, N. Car., 23 S. E. Rep. 432.

209. SPECIFIC PERFORMANCE—Evidence.—In an action for specific performance of a contract for the sale of land it was proper to exclude evidence of declarations made after the execution of the contract by one who, prior to its execution, acted as intermediary between the parties, in the absence of evidence that he was agent of either party after the contract was executed. —POMEROY V. FULLERTON, Mo., 33 S. W. Rep. 173.

210. SPECIFIC PERFORMANCE — Restraining Conveyance.—In an action by a vendee to compel the delivery of a deed held in escrow, and to restrain the vendor from conveying the land, where a preliminary injunction is granted, and a decree is made requiring the delivery of the deed on the payment by plaintiff of a certain sum at a certain time, and plaintiff makes default in such payment, it is proper to amend the decree by dissolving the injunction and directing delivery of the deed to the vendor, and vesting the title in him.—CARSON MIN. CO. V. HILL, Colo., 42 Pac. Rep. 678.

211. TAXATION—Restraining Collection.—A complaint to enjoin the collection of a tax, which merely alleges that defendant had notified plaintiff that the tax was due and must be paid on a certain date; that the assessment and levy were illegal and void; that plaintiff had paid his taxes for the year claimed, and had a receipt, and that if defendant is permitted to collect the tax, it will work great and irreparable damage to plaintiff, does not state a cause of action, the suit being commenced before the date fixed by defendant for payment.—INSURANCE CO. OF NORTH AMERICA V. BONNER, Colo., 42 Pac. Rep. 681.

212. TAXATION—Theaters and Shows—License.—The legality of a tax is contested when it is alleged that there is no law under which the license or tax can be imposed.—STATE V. LUNDIE, La., 18 South. Rep. 636.

213. TAX SALE—Description of Land.—The notice of a tax sale of land described the land as a tract owned by H, containing 64 acres, called the "T B Tract," described in a certain recorded deed. The deed called for a tract containing 103 acres. H had conveyed the land, one person at the time owning 50 acres of the tract, another 25 acres, another 38: Held, that the sale was invalid, on account of the indefinite description of the land.—RICHARDSON V. SIMPSON, Md., 30 Atl. Rep. 457.

214. TAX SALE—Validity.—Rev. St., par. 2694, providing that the owner of property offered for sale for taxes may designate what portion he wishes sold, and that if he fails to do so the collector "may designate it," and a person who will take the least quantity and pay the taxes, etc., shall be declared the purchaser, is mandatory, and the collector is bound to designate some portion of the tract, and offer it for sale first.—JACOBS V. BUCKALEW, Ariz., 42 Pac. Rep. 619.

215. TELEGRAPH COMPANY—Failure to Send Telegram. —How. Ann. St. § 3706 (Acts 1851, Act No. 59, § 14), imposes the duty on telegraph companies to transmit messages with impartiality and good faith, under a penalty of $100 for each neglect or refusal to do so: Held, that a judgment for the recovery of such penalty is erroneous, where the finding of bad faith is not supported by the evidence, and there is a finding that the message was misplaced by defendant's agent, and so escaped the attention of the operator.—WEAVER V. GRAND RAPIDS & I. R. CO., Mich., 65 N. W. Rep. 225.

216. TOWN COMPANIES—Contract.—Where a town company induced L to remove his store building and stock of goods, at great expense, from a village, a short distance, to a new town site, by a contract of guaranty, made by its general agent in the usual way, that a railroad would be constructed and in operation to the town site within a given time, such company cannot be relieved from liability for a breach of the contract on the ground of the want of power to make it, nor because the board of directors did not formally confer authority on the general agent to enter into it.—ARKANSAS VALLEY TOWN & LAND CO. V. LINCOLN, Kan., 42 Pac. Rep. 706.

217. TRESPASS—Instructions.—In an action against a tenant for destruction of crops by defendant's cattle, and for damages for forcible entry, it appeared that the land consisted of a pasture and of cultivated land in separate inclosures belonging to defendant's landlord; that plaintiff was a trespasser, and in the actual occupancy only of the cultivated land; that defendant obtained peaceable possession of the pasture and turned his cattle on it, and that they escaped from it to the cultivated land and destroyed the crops. The court charged that a forcible entry is an entry by any one on the premises without the consent of the person having the actual possession: Held, that such instruction, though not applicable to the pasture land, may have been applicable to the entry on the cultivated land, and could not be said to be erroneous.—HEIRONIMUS V. DUNCAN, Tex., 33 S. W. Rep. 287.

218. TRESPASS TO TRY TITLE—Defenses.—It is no defense to an action of trespass to try title by one claiming under foreclosure of a deed of trust given by defendant that defendant bought the land from the State, and had not entirely paid for it, both parties claiming under a common source of title.—BRADFORD V. STONEROAD, Tex., 33 S. W. Rep. 156.

219. TRUST—Parol Trust—Enforcement.—Where complainant purchased land in his wife's name, with the parol understanding that it was to be occupied as a home by complainant and wife, so long as each should live, but the wife devised the property to others, complainant cannot enforce a trust against the devisees, as How. Ann. St. § 6179, provides that no estate or trust in lands shall be created unless by operation of law or deed in writing.—CHAPMAN V. CHAPMAN, Mich., 65 N. W. Rep. 215.

220. TRUST AND TRUSTEE—Deposit and Withdrawal of Trust Funds.—Where a trustee deposits with a firm the trust funds in his own name in the usual course of business, and it is paid out to him or on his order, without any knowledge by the firm that the money is not his until after his death, and it has probated its claims against his estate, such firm is not liable to the beneficiaries for the money deposited.—TENNY V. PORTER, Ark., 33 S. W. Rep. 211.

221. VENDOR AND PURCHASER—Bona Fide Purchasers. —Where a vendee of land, by deed from husband and wife, conveyed it to plaintiff, who examined the title papers, and was ignorant of any fraud practiced on the wife, the fact that the vendors were in possession at the time plaintiff purchased was insufficient to charge him with notice, he having been told that the land would shortly be vacated.—HICKMAN V. HOFFMAN, Tex., 33 S. W. Rep. 257.

222. VENDOR AND PURCHASER—Delay of Purchaser—Rights of Parties.—Where a contract for the sale of land described the land as that occupied by the vendor, but stated that it contained a certain number of acres, and on the tender by the vendor to convey the land occupied by him, the vendee refused to accept a deed thereof unless there was deducted from the price a sum proportionate to the number of acres therein less than the number stated in the contract, and, after the

vendee had litigated the question for a number of years, it was decided that he was not entitled to such deduction, and he then offered to pay the price without deduction, the pendency of the litigation, though carried on in good faith and by advice of counsel, did not excuse his delay in tendering performance, where meantime the value of the property had increased five-fold.—DOCTER v. FURCH, Wis., 65 N. W. Rep. 160.

223. VENDORS AND PURCHASERS — Notice— Equitable Lien.—A stranger to the title, at the landowner's request, executed to him a deed of trust on the land, which was recorded, to secure a note payable to the owner, who negotiated the note: Held, that a purchaser of the land, having actual knowledge of the existence of the deed of trust, who merely required the owner to enter a satisfaction thereof of record, without the production of the note or deed of trust, took with notice of and subject to the equitable lien of the assignee of the note.—BARRETT v. BAKER, Mo., 33 S. W. Rep. 162.

224. VENDOR AND PURCHASER—Specific Performance. —Where A makes a written contract for a sale of real property to B, which is forthwith placed on record, and afterwards conveys the property to C, who buys with constructive notice of the rights of B under his contract: Held, that an action to compel a conveyance of the legal title, after full performance of his part of the contract by B, may be maintained against C, and that A is not an indispensable party to the action.—TOPEKA WATER SUPPLY CO. v. ROOT, Kan., 42 Pac. Rep. 715.

225. VENDORS' LIENS—Priority.—Plaintiff, who held two notes secured by vendor's lien on land, sent the one first due to W for collection, and W sent it by express to a certain town with instructions to the express company to deliver it on payment to a certain person who was an indorser. Such indorser procured the company to transfer it to B, who paid the amount due, which was sent to plaintiff through W. Neither plaintiff nor W knew that B took up the note: Held, that B's vendor's lien was postponed to plaintiff's lien securing the second note due.—GODDARD v. PEEPLES, Tex., 33 S. W. Rep. 314.

226. WAREHOUSEMAN—Negligence.—Where personal property is delivered to a warehouseman, who fails to deliver it upon demand, these facts constitute *prima facie* negligence on the part of the warehouseman, unless he shows that the goods were lost or stolen and the manner of such loss or theft, which facts he must prove with reasonable certainty.—GEO. C. BAGLEY ELEVATOR CO. v. AMERICAN EX. CO., Minn., 65 N. W. Rep. 264.

227. WATERS—Diversion—Railroad.—In an action for the diversion of surface water or the water of natural streams by the construction of railway lines, surveys of the locality, made under order of the court, must be introduced, and accompany the record on appeal, or showing be made by appellant that he was prevented by the court or the opposite party from so doing, on penalty of liability to dismissal of appeal or affirmance of judgment on the ground that it is impossible to review the alleged errors.—WHICHARD v. WILMINGTON & W. R. CO., N. Car., 23 S. E. Rep. 487.

228. WILLS.—In a suit for construction of a will by which a testator first devised all his personal property to a daughter, and, after providing that she was to have no share in the balance of his estate, devised it to his other children, it appeared that when the will was made the testator owned, and had, by an unrecorded written agreement, contracted to sell a tract of land, the vendee to pay the purchase price "according to the last will" of testator, to his "heirs;" that before his death the testator deeded the land to the vendee, and took a promissory note for the price: Held, that the note did not pass to the daughter, under the bequest to her of all the personal property, but must be distributed according to the terms of the will, to the remaining eight children.—FRICK v. FRICK, Md., 33 Atl. Rep. 462.

229. WILL—Attestation—Execution.—Under Rev. St. 1889, § 8870, providing that every will shall be attested by two or more witnesses, subscribing their names to the will in the presence of the testator, the signatures of the witnesses, without the attestation clause, is sufficient.—BERBERET v. BERBERET, Mo., 33 S. W. Rep. 61.

230. WILLS—Construction.—Testator gave a certain farm "to W and his children forever, but if W shall die leaving no child" the farm was devised to J: Held, that W took a fee-simple, to be defeated only in case he died without children; the words "his children forever" being words of limitation and not of purchase, creating an estate tail, which by statute was made a fee-simple.—HOOD v. DAWSON, Ky., 33 S. W. Rep. 75.

231. WILLS—Description of Devisees.—Where a will devises to one a life estate, with remainder "to his descendants, if any, in fee, according to the laws of descent and distribution," otherwise to a charitable institution, a mother and a brother and sister of the half blood of the devisee cannot claim the remainder in fee as "descendants and heirs-at-law" of the devisee.—TICHENOR v. BREWER'S EX'R, Ky., 33 S. W. Rep. 86.

232. WILLS—Letter.—As Rev. St. 1894, § 2746 (Rev. St. 1881, § 2576), provides that no will shall affect any estate unless it be attested and witnessed, a letter written by the testator to his wife, relative to the disposition of his property, not attested in the manner required by statute, cannot be considered as a will.—ORTH v. ORTH, Ind., 42 N. E. Rep. 277.

233. WILLS—Nature of Estate.—Testator left all his real estate to his wife for life, to go to his children or their descendants at her death, and in another clause provided that, if his wife should die before the youngest child became of age, the two oldest sons should take charge of the property, and care for the family until such child should attain its majority, whereupon the land was to be sold, and equally divided between testator's children or their descendants: Held, that immediately on testator's death, the children acquired a vested remainder, though the beneficial interests might, on the termination of the life estate, be further postponed until the majority of the youngest child.—BYRNE v. FRANCE, Mo., 33 S. W. Rep. 178.

234. WILL—Testamentary Capacity.—Absolute sanity is not always the test of testamentary capacity, and where it is shown that a will was executed by a testatrix whose mind was impaired by old age and enfeebled by apoplectic attacks, followed by partial paralysis, so that she was unable to understand to a reasonable degree the effect and operation of the will upon her property and those entitled to receive it, a finding of incapacity will be sustained.—HUDSON v. HUGHAN, Kan., 41 Pac. Rep. 701.

235. WITNESS — Impeachment. — While the general rule is that a witness cannot, for the purpose of impeaching his credibility, be cross-examined as to collateral matters, yet his feelings, and his disposition to conceal or pervert the truth, in the particular suit in which he is called, are not collateral matters within the meaning of the rule.—ALWARD v. OAKS, Minn., 65 N. W. Rep. 270.

236. WITNESS — Privileged Communications. — Code Civ. Proc. § 1881, subd. 2, providing that an attorney cannot be examined, without the consent of his client, as to communications made to him by the client in the course of professional employment, does not preclude an attorney who witnessed a will he had drawn for decedent from testifying as to testator's mental capacity and instructions in regard to the will, as, by requesting him to witness the will, decedent waived the provisions of the statute.—IN RE MULLIN'S ESTATE, Cal., 42 Pac. Rep. 645.

237. WRIT OF ERROR—When Lies.—A writ of error will not lie to review an order of the circuit court affirming one of the probate court requiring an executor to furnish a further bond and to render an account.—IN RE SANBORN, Mich., 65 N. W. Rep. 209.